LIBRARY
SUPREME COURT, U. S.

No. 74-1232

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

BELTRONICS, INC., Petitioner,

v.

EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.,
and
WESTERN ELECTRIC COMPANY, INCORPORATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN T. WILSON
900 Equitable Building
Denver, Colorado 80202
Attorney for Petitioner

Of Counsel:

DWIGHT A. HAMILTON
FULLER and EVANS
900 Equitable Building
Denver, Colorado 80202

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	10
I	10
II	14
CONCLUSION	21
APPENDIX	
Opinion of the District Court	1a
Opinion of the Court of Appeals	23a
Order of Court of Appeals Denying Petition for Rehearing	34a

Table of Contents Continued

TABLE OF AUTHORITIES CITED

CASES: Page

Bigelow v. RKO Pictures, 327 U.S. 251 (1946) 3

Conference of Studio Unions v. Lowe's Inc., 193 F.2d 51 (9th Cir. (1951) 20

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) . 3

Hawaii v. Standard Oil Company of California, 405 U.S. 251 (1972) . . . 15

In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973) 15, 16, 19

Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955) 19

Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969) . 10, 15, 16

Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942) 16

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1937) 3

United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

BELTRONICS, INC., Petitioner,

v.

EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.
and
WESTERN ELECTRIC COMPANY, INCORPORATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petitioner Beltronics, Inc. hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado is reported at 369 F. Supp. 295 (Colo. 1973), and the opinion of the United States Court of Appeals for the Tenth

Circuit is reported at 1974 CCH Trade Cas. ¶75,385. Both opinions are reprinted in the Appendix to this Petition. (App. 1a and 23a).

JURISDICTION

The decision of the Court of Appeals, which constitutes its judgment, was entered on December 4, 1974. On December 31, 1974 the Court of Appeals denied Petitioner's timely Petition for Rehearing. (App. 34a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is Section 1 of the Sherman Act violated when a manufacturer sells component products to another manufacturer subject to the contractual restrictions that (i) the component products be used only to manufacture certain end products, and that (ii) after manufacture the end products be sold only to the first manufacturer, where the first manufacturer then resells the end products, without physical change, to the ultimate consumers, and where but for the restrictions on resale the second manufacturer could itself sell the end products directly to the ultimate consumers?

2. Is the exclusive sales representative of the second manufacturer injured in its business or property by reason of the restrictions on resale of both the component products and end products when the first manufacturer uses the market control it has obtained

through the resale restrictions to prevent competition with it for sale of the end products to the ultimate consumers, refuses to do business with the sales representative, and forces the second manufacturer to terminate its contractual relationship with the sales representative?

3. May the exclusive sales representative of the second manufacturer base a projection of what its profits would have been, after the date its business was destroyed, partly upon its past earnings as an exclusive sales representative for another manufacturer which manufactured the same products and sold them to the same customers, and upon the continuing sales of the second manufacturer?[1]

---

1 Petitioner will not argue here the reasons for granting the writ as to question No. 3, and it does not urge that question as an independent ground for the exercise of this Court's certiorari jurisdiction. However, should the Court grant certiorari on questions Nos. 1 and 2, Petitioner urges that it also grant certiorari with respect to question No. 3 since the District Court failed to follow the decisions of this Court relating to the degree of certainty required in proving the amount of damages after the fact of damage has been established, and excluded the bulk of Petitioner's proposed evidence relating to the measurement of damages. See Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); and Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .."

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

Beltronics, Inc. ("Beltronics") seeks review of the decision of the United States Court of Appeals for the Tenth Circuit affirming the decision of the United States District Court for the District of Colorado denying recovery to Beltronics. The basis of jurisdiction of the District Court was 15 U.S.C. §15.

Beltronics, a Colorado corporation, was the exclusive sales representative of Eberline Instrument Corporation ("Eberline") and its wholly owned manufacturing subsidiary, Capco, Inc. ("Capco"), (Eberline and Capco will sometimes be referred to collectively as "Eberline") for sale of capacitors and capacitor cases to the telephone industry throughout the United States. Western Electric Company, Incorporated ("Western Electric") is a wholly owned subsidiary of American Telephone & Telegraph Company ("AT&T"), which in turn owns all or a substantial percentage of 23 subsidiary operating telephone companies ("Bell Telephone Companies"). Bell Telephone Laboratories ("Bell Laboratories") is owned one-half by AT&T and one-half by Western Electric. AT&T, Bell Laboratories and the Bell Telephone Companies were not parties to this litigation.[2]

From 1956 to 1960, Landes, Zachary & Peterson, Inc., a predecessor of Beltronics, purchased capacitors from a manufacturer and resold them directly to the Mountain States Telephone & Telegraph Company ("Mountain Bell") at Mountain Bell's various locations in eight states. In 1960 this business was transferred to Beltronics which shortly thereafter (sub. nom. Midwec Sales Company) became the exclusive sales representative of Midwec Corporation for sale of capacitors manufactured by Midwec Corporation to the telephone industry.

---

2 A copy of the Appendix filed with the Court of Appeals has been lodged with the Clerk of the Court.

During 1960 Beltronics sold $18,000 worth of capacitors manufactured by Midwec Corporation directly to Mountain Bell. By the end of 1961 Midwec Corporation had added capacitor cases to its product line and Beltronics had expanded its list of customers. In 1961 Beltronics sold $204,000 worth of capacitors and capacitor cases directly to the Pacific Telephone Company, Southwestern Bell Telephone Company, Southern Bell Telephone Company and the Wisconsin Telephone Company, in addition to Mountain Bell. All of these telephone companies were owned wholly or in part by AT&T. The only other company known to Beltronics to be selling these products directly to these Bell Telephone Companies during this period was Western Electric.

In September, 1961 an officer of Beltronics was summoned to New York City by an AT&T engineer and told that AT&T did not like to have anything sold in volume directly to the Bell Telephone Companies without first passing through the hands of Western Electric and being approved by Bell Laboratories. Beltronics was told that a supply contract with Western Electric was required.

On the afternoon of the same day an employee of Western Electric told Beltronics that Western Electric looked with disfavor upon Beltronics selling directly to the Bell Telephone Companies, and that it was a hard and fast rule that products sold to the Bell Telephone Companies had to be sold through Western Electric and

be manufactured in accordance with Bell Laboratories specifications.

Bell Laboratories then requested and was supplied with the manufacturing specifications used by Midwec Corporation, and over the next several months developed its own specifications for the capacitors and capacitor cases which Beltronics had been selling directly to the indicated Bell Telephone Companies. These specifications required that wire and cable manufactured by Western Electric be used in the capacitors and capacitor cases.[3]

In March, 1962, after these specifications were issued by Bell Laboratories, Western Electric and Midwec Corporation entered into a supply contract providing for the purchase of the capacitors and capacitor cases by Western Electric from Midwec Corporation. This supply contract required that the products be manufactured according to the Bell Laboratories specifications, and contained a provision whereby Western Electric agreed to sell to Midwec Corporation the Western Electric manufactured wire and cable required by the specifications. The contract provided further, however, that the wire and cable once purchased by Midwec Corporation was to be used solely for

3 The specifications contained the language "or equivalent" but there was no evidence that wire or cable manufactured by anyone other than Western Electric was ever accepted by Western Electric, Bell Laboratories or the Bell Telephone Companies after the specifications were issued.

the performance of the supply contract. It required that all orders for the wire and cable include a statement that the material was to be used exclusively in the manufacture of articles for Western Electric.

Following execution of the supply contract between Western Electric and Midwec Corporation, Beltronics, acting as the exclusive sales representative of Midwec Corporation, sold the capacitors and capacitor cases manufactured with the Western Electric wire and cable to Western Electric as required by the supply contract, rather than directly to the Bell Telephone Companies as it had previously done. An officer of Beltronics testified that the supply contract "made us sell the products back to Western Electric". Western Electric in turn simply resold the products to the Bell Telephone Companies.

Title to, dominion over, and risk of loss of the wire and cable sold by Western Electric under the supply contract passed to Midwec Corporation.

The supply contract between Western Electric and Midwec Corporation was an annual contract which was renewed at least through 1967.

In 1967 Beltronics terminated its relationship with Midwec Corporation, and in 1968 was purchased by Eberline which at the same time purchased Capco. The purpose of these acquisitions by Eberline was to obtain a capacitor manufacturer

and an experienced sales representative to enable Eberline to supply capacitors and capacitor cases to the telephone industry. Thereafter a supply contract was entered into between Western Electric and Eberline. It contained the same provisions for sale and restrictions on resale of the Western Electric manufactured wire and cable that were present in the Midwec Corporation supply contract.

In January, 1969, Beltronics was repurchased from Eberline by its former shareholders. As part of the repurchase Beltronics entered into an Exclusive Sales Representative Agreement with Eberline and Capco whereby Beltronics became their exclusive sales representative for sale of capacitors and capacitor cases to the entire telephone industry throughout the United States. This Agreement was to run for five years, and was renewable by Beltronics for an additional five year period. Beltronics was to receive a 15% sales commission. Beltronics then commenced negotiations with Western Electric for a renewal of the existing supply contract which was scheduled to expire on May 1, 1969.

At a meeting in New York City on April 14, 1969, Western Electric advised Eberline and Beltronics that Western Electric would do no further business with Beltronics, or with Eberline so long as Beltronics was associated with Eberline. Eberline then terminated its relationship with Beltronics and Beltronics went out of business.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erroneously distinguished this case from United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), and consequently rendered a decision on the wire and cable resale restrictions issue which is in clear conflict with this Court's decision in Schwinn. The Court of Appeals' further decision that in any event Beltronics was not damaged by the resale restrictions conflicts with this Court's decision in Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969), and with application of both of the analytical techniques utilized by virtually all the lower courts when deciding the causation issue.

I

THE COURT OF APPEALS ERRONEOUSLY DISTINGUISHED THIS CASE FROM UNITED STATES V. ARNOLD, SCHWINN & CO. AND CONSEQUENTLY RENDERED A DECISION WHICH IS IN CLEAR CONFLICT WITH THIS COURT'S DECISION IN SCHWINN

The Court of Appeals ruled that this case did not involve a vertical relationship such as that in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), that there was no impediment to competition, and that consequently Schwinn has no application. (App. 31a.) This ruling cannot stand when applied to the facts found by the District Court. As applied to the facts it can only be regarded as a

misinterpretation of Schwinn which, if uncorrected, will stand as authority for a substantial departure from the clear principal announced by this Court.

Prior to the first supply contract between Western Electric and Midwec Corporation in 1962, Beltronics sold capacitors and capacitor cases on behalf of Midwec Corporation directly to a number of the Bell Telephone Companies. The wire and cable used in these capacitors and capacitor cases was purchased from General Cable Corporation. Thus, the vertical distributional chain of the wire and cable was from General Cable Corporation to Midwec Corporation, and from Midwec Corporation, incorporated in capacitors and capacitor cases, through Beltronics directly to the ultimate purchasing Bell Telephone Companies.

This vertical distributional chain was altered when Bell Laboratories issued its specifications requiring that wire and cable manufactured by Western Electric be utilized in these products.[4]

---

4 Petitioner contends that once these specifications were issued the Bell Telephone Companies would and did purchase only products which conformed to the specifications. This contention is buttressed by Western Electric's admission that during 1968 and 1969 it supplied substantially all the Bell Telephone Companies' requirements of the products. Discovery of evidence of this practice for the years 1962-1967 was denied Beltronics. This practice, however, can clearly be inferred for the earlier years from the totality of evidence produced at trial.

Thereafter in order to comply with these specifications and to sell to the Bell Telephone Companies Midwec Corporation (and later Eberline) had to enter into a supply contract with and purchase wire and cable from Western Electric. Had it not been for the resale restrictions in these supply contracts the vertical distributional chain of the wire and cable would then have been from Western Electric to Midwec Corporation (and later Eberline) and from Midwec Corporation (and later Eberline), incorporated in capacitors and capacitor cases, through Beltronics to the Bell Telephone Companies and other telephone companies in the telephone industry. However, because of the resale restrictions Midwec Corporation (and later Eberline) was required to sell the capacitors and capacitor cases to Western Electric which in turn, without physically changing the products, resold them to the Bell Telephone Companies.

These facts are not distinguishable from the facts in Schwinn. There this Court considered the effect of resale restrictions on intrabrand competition in the sale of bicycles. Schwinn franchised retailers who were allowed to purchase only from or through the distributor authorized to serve a particular area, and were authorized to sell only to consumers and not to unfranchised retailers. The distributors when purchasing from Schwinn were allowed to sell only to franchised Schwinn accounts in their respective territories.

This Court held these resale restrictions illegal per se in those situations where the distributor and retailer purchased the bicycles.

> "Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred--whether by explicit agreement or by silent combination or understanding with his vendee--is a per se violation of §1 of the Sherman Act." 388 U.S. at 382.

In Schwinn, competition between distributors for sales to retailers and between retailers for sales to consumers was impeded by the resale restrictions imposed by Schwinn. In this case the resale restrictions imposed by Western Electric ended all competition with Western Electric for sale of capacitors and capacitor cases to the Bell Telephone Companies.

The Court of Appeals' statement that "in effect Western bought the cable back, albeit in a different form" (App. 31a), ignores the central fact that by the resale restrictions Western Electric artificially inserted itself into the existing vertical chain of distribution to the ultimate purchasers with the consequent elimination of competition for sale of these products to the Bell Telephone Companies.

These restrictions also prevented unfettered resale of the wire and cable, either as such or incorporated in other products, to the non-Bell consuming telephone industry.

The facts of this case show even a more extensive restraint on competition than was involved in Schwinn. In Schwinn the only product the resale of which was restrained was bicycles. In this case the resale restrictions covered not only the wire and cable as such but also extended to capacitors and capacitor cases incorporating the wire and cable, products which Western Electric did not even manufacture.

By ruling in Schwinn that "it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it", 388 U.S. at 379, this Court laid down a rule of law which governs this case but which was not applied by the Court of Appeals. The failure of the Court of Appeals to apply the rule of Schwinn is an unwarranted dilution of this Court's clear directive, and if uncorrected can only give support to the efforts of others to evade the Schwinn doctrine by manipulations placing form over reality.

II

THE COURT OF APPEALS' RULING THAT BELTRONICS WAS NOT DAMAGED BY THE RESALE RESTRICTIONS

CONFLICTS WITH THIS COURT'S DECISION IN PERKINS V. STANDARD OIL COMPANY OF CALIFORNIA AND WITH APPLICATION OF THE CAUSATION ANALYSES APPLIED BY VIRTUALLY ALL THE LOWER COURTS

The Court of Appeals ruled there was nothing in the record to show that Beltronics was, or could have been, damaged by the resale restrictions. (App. 31a-32a). This ruling, which was not discussed by the Court of Appeals in terms of any statute or case law or otherwise analyzed, is in conflict with this Court's decision in Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969), and with both of the causation analyses utilized by virtually all the lower courts.

Section 4 of the Clayton Act, 15 U.S.C. §15, establishes two requirements which a plaintiff must satisfy before it may recover for a violation of the antitrust laws. First, a plaintiff must prove injury to his "business or property." Second, a plaintiff must prove that the injury suffered was occasioned "by reason of" an antitrust violation. Hawaii v. Standard Oil Company of California, 405 U.S. 251, 261, 262 n.14, 264 (1972); In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir. 1973), cert. denied, 414 U.S. 1045 (1973).

In Hawaii this Court held that the words "business or property" refer to commercial interests or enterprises,

citing, among other cases, Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942). 405 U.S. at 264. Clearly the business of Beltronics as a sales agent possessing an exclusive territory of the entire United States for sale of specific products to an established clientele constitutes "business or property" within the decision of this Court in Hawaii. Beltronics' business is virtually identical to the business of the sales agent plaintiff in Roseland.

Numerous lower court decisions have considered the second requirement, that the injury suffered was occasioned "by reason of" an antitrust violation, and two analytical techniques have been employed--the "direct injury" and the "target area" approaches. No uniform definition of "by reason of" has been formulated, however. In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 126, and cases collected therein.

This Court considered the causation issue in Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969), although the result was not directly cast in terms of either of the two analytical techniques utilized by the lower courts. In Perkins, a Robinson-Patman Act price discrimination case, two Perkins corporations engaged in the wholesale gasoline business were held to have been damaged by reason of discriminatory lower prices charged by Standard Oil to their competitors. In addition to corporate damage, this Court directed that Perkins individually be allowed to

recover damages because the two failing corporations were unable to pay him agreed brokerage fees for securing gasoline, rental on leases of service stations and other indebtedness. This Court held that Perkins "was no mere innocent bystander; he was the principal victim of the price discrimination practiced by Standard. Since he was directly injured and was clearly entitled to bring this suit, he was entitled to present evidence of all of his losses to the jury." 395 U.S. at 649-650.

The parallel between Perkins and the instant case compels a finding of causation in this case. While Eberline is not a plaintiff it was nevertheless damaged by reason of the resale restrictions because they prevented Eberline from selling the products directly to the Bell Telephone Companies, as well as to non-Bell purchasers. The further threat of Western Electric to cease doing business with Eberline, if carried out, would have eliminated Eberline from this business entirely, an injury analogous to the injury suffered by the two Perkins corporations as a result of Standard Oil's price discrimination.[5]

5 It should be recognized at this point that Eberline's market for these products at the time was exclusively the Bell Telephone Companies, and through the resale restrictions Western Electric had obtained total control of this portion of Eberline's business.

Thus, Standard Oil conducted its business dealings with the two Perkins corporations in such a way (discriminatory higher prices) that they failed. Western Electric conducted its business dealings with Eberline in such a way (resale restrictions) that Eberline was unable to sell directly to the Bell Telephone Companies or to non-Bell purchasers, and would be unable to sell the specified products at all if Western Electric terminated their relationship. In Perkins it was the failing of the two Perkins corporations which caused Perkins individual damage. In the instant case it was the initial impairment of Eberline's business and later the threat of the destruction of this business which caused Eberline to terminate its relationship with Beltronics and hence Beltronics' ultimate damage. The resale restrictions, therefore, acted directly upon Beltronics by first preventing Beltronics from selling directly to the Bell Telephone Companies and later by forcing Eberline to accede to Western Electric's directive to terminate Eberline's relationship with Beltronics.

A finding of causation is also compelled by both the "target area" and "direct injury" approaches, even if the factual analogy to Perkins did not exist. Before applying these two approaches to the facts of the instant case, however, they must be considered in light of the Perkins decision. Perkins has been construed to have implicitly undermined, by analogy, the more restrictive "direct injury" approach with its holding that a

"fourth level" price discrimination is encompassed within the language of Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13(a)). This Court characterized the lower court's refusal to find a causal connection between the supplier's violation and damage to the plaintiff who competed with the fourth level purchaser from the supplier as creating an artificial limitation "completely unwarranted by the language or purpose of the" Robinson-Patman Act. 395 U.S. at 647. This Court stressed the nature of the competitive harm, and not the relationship between Perkins and the defendant, when it stated that "the competitive harm done him by Standard is certainly no less because of the presence of an additional link in this particular distribution chain from the producer to the retailer". 395 U.S. at 647. In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 128. Perkins has also been construed to give direct support to the "target area" approach since a "target area" case, Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955), was cited by the Court just prior to the holding that Perkins as an individual was directly injured by the antitrust violation. In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 128-129.

Application of the apparently favored "target area" approach requires that a plaintiff's business be "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry". e.g.,

Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952). The pertinent area of the economy in the instant case is clearly the manufacture and sale of the subject products, an area unquestionably encompassing Beltronics which was the exclusive sales agent of a manufacturer for sale of the subject products.

The "direct injury" approach focuses primarily on the relationship between the defendant and the plaintiff. In the instant case Beltronics dealt directly with Western Electric on behalf of the manufacturers it represented. It stood squarely between Western Electric (and the Bell Telephone Companies) and the manufacturers it represented in all sales matters. The resale restrictions operated directly upon Beltronics in this position by (1) preventing its selling directly to the Bell Telephone Companies, as it had once done, and by (2) depriving Beltronics of even indirect access to sales to the Bell Telephone Companies through Western Electric when Western Electric refused to do further business with it. Since Beltronics' business at the time was selling the subject products to the Bell Telephone Companies, at first directly and later indirectly through Western Electric, Western Electric's refusal to do further business with Beltronics completely destroyed Beltronics' business.

Further, Beltronics had a direct contractual relationship with Eberline through the Exclusive Sales Representative Agreement. The resale restrictions in the supply contract between Western Electric and Eberline operated directly on this contractual relationship by denying Beltronics the right granted it in the Exclusive Sales Representative Agreement to sell the subject products to the telephone industry throughout the United States.

CONCLUSION

The decision of the Court below on the legality of the resale restrictions conflicts with this Court's decision in Schwinn. If this decision is not corrected it will stand as authority for evasion of the Schwinn doctrine in other industries through creation of unnecessary levels in the distribution process, and other artifices placing form over reality.

The Court of Appeals' further decision that Beltronics was not injured by the resale restrictions conflicts with this Court's decision in Perkins. Additionally, the holding that there was no injury conflicts with both of the analytical techniques applied by virtually all the lower courts when considering the causation requirement of Section 4 of the Clayton Act.

For the reasons stated in this Petition the Writ should be granted.

Respectfully submitted,

JOHN T. WILLSON
900 Equitable Building
Denver, Colorado 80202
Attorney for Petitioner

Of Counsel:

DWIGHT A. HAMILTON
FULLER and EVANS
900 Equitable Building
Denver, Colorado 80202

Dated: March 27, 1975

CERTIFICATE OF SERVICE

This is to certify that I have this date served the attached Petition for Writ of Certiorari on Eberline Instrument Corporation and Capco, Inc. by depositing three copies of the same in a United States Post Office, airmail postage prepaid, addressed to their counsel of record Robert C. Poole, Poole, Tinnin, Danfelser & Martin, Suite 816, Bank of New Mexico Building, Albuquerque, New Mexico 87102, and on Western Electric Company, Incorporated by depositing three copies of the same in a United States Post Office, first class postage prepaid, addressed to its counsel of record, Stuart S. Gunckel, Room 1300, 931 - 14th Street, Denver, Colorado 80202.

All parties required to be served have thus been served.

John T. Willson

JOHN T. WILLSON

March 27, 1975

APPENDIX

(Filed December 3, 1973)

BELTRONICS, INC., et al.,
Plaintiffs,

v.

EBERLINE INSTRUMENT CORPORATION, et al.,
Defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

(Civil Action No. C-1598)

Dwight A. Hamilton and John T. Willson, of Fuller & Evans, Denver, Colo. for Plaintiffs.

Robert C. Poole and Robert W. Harris, of Poole, Tinnin, Danfelser & Martin, Albuquerque, N. M., for defendants Eberline Instrument Corp., and Capco, Inc.

Stuart S. Gunckel and Robert A. Dick, of Rovira, DeMuth & Eiberger, Denver, Colo., for defendant, Western Elec. Co., Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CHILSON, District Judge.

STATEMENT OF THE CASE

This action came on for trial to the Court without a jury on the 12th day of November, 1973, and was concluded on November 26, 1973.

The Court after hearing the evidence, the argument of counsel and having received written briefs of the parties, took the case under advisement for the purpose of preparing written Findings of Fact and Conclusions of Law.

This action arose out of a series of transactions whereby the plaintiff Beltronics and the defendants, Eberline and Capco, undertook to supply Western Electric with certain devices called "capacitors" and "capacitor cases" for use by the Bell Telephone System.

The issues submitted to the Court for determination can best be defined after setting forth the Findings of Fact. Most of the material facts are not in dispute and in those areas where the material evidence is in conflict, these Findings of Fact reflect the Court's resolution of those conflicts.

FINDINGS OF FACT

The Bell Telephone system consists of twenty-three operating companies which are subsidiaries of the American Telephone and Telegraph Company. (A.T.&T.)

The defendant, Western Electric Company (Western Electric) is a wholly-owned subsidiary of A.T.&T. One of its principle functions is to purchase supplies, equipment, and materials for use in the Bell system.

One of the means of accomplishing this purpose is by supply contracts entered into between Western Electric and suppliers by which a supplier agrees to sell its products to Western Electric, upon order, at stated prices and in accordance with stated specifications to control the quality of the products.

The supply contract by its terms is for a limited period of time and provides no right of renewal by either party, but ordinarily if performance has been satisfactory, and if the price for the product can be agreed upon, the supply contract is renewed or a new supply contract is entered into for another specific period of time.

For some years prior to 1960, the plaintiffs, King and Peterson had sold capacitors manufactured by Goodall Electric Company, to some of the operating companies of the Bell system.

In 1960, Midwec Corporation of Oshkosh, Nebraska, began to manufacture capacitors. Midwec Corporation entered into an Agreement with Midwec Sales Co., a company controlled by King and Peterson, whereby Midwec Sales would act as the exclusive sales representative of Midwec Corporation in the sales of capacitors and capacitor cases. In the name of Midwec Sales, King and Peterson continued to sell capacitors and capacitor cases to the operating companies of the Bell system until 1962.

In 1961, Western Electric advised Midwec Corporation that the magnitude of the sales to the Bell operating companies required the development of specifications for the products and a supply contract with Western Electric.

After tests of the products by the Bell Telephone Laboratory specifications were prepared, tests were made and in March 1962 Midwec Corporation and Western Electric entered into a supply contract. Midwec Sales Company continued to be the exclusive sales representative of Midwec Corporation for the sale of the capacitors until September 1967, when the contract between Midwec Corporation and Midwec Sales Corporation was terminated by mutual agreement.

In 1966, Western Electric expressed to Midwec Sales a desire for a second source of supply of the products to avoid overdependence on Midwec Corporation for a supply of capacitors and cases.

When Midwec Corporation and Midwec Sales terminated their Agreement in 1967, King proposed to Eberline that it manufacture the capacitors and capacitor cases and thereby become the second source of supply of these products to Western Electric.

After lengthy negotiations, a plan was adopted and carried out by which Eberline acquired Capco, Inc., a Texas Corporation with a plant at Lubbock, Texas, to manufacture the capacitors and capacitor cases and Eberline also acquired all of the stock of Midwec Sales Company (whose name was changed to Beltronics, Inc.) and Beltronics was made the marketing organization. King and Peterson became the principal officers of Beltronics.

Basic to this plan, was the knowledge of the parties that the market for the products was limited almost entirely, if not entirely to Western Electric and that without a supply contract with the Western Electric Company, the venture could not succeed. The plaintiffs, Eberline and Capco, in entering upon this venture, acted upon the basic assumption that a supply contract with Western Electric would be obtained and maintained. This basic assumption was also implicit in the modification of the venture in January 1969 when the parties modified their original Agreement by the execution of Exhibits A and B referred to later in these Findings.

Once the plan was adopted, Beltronics began negotiations with Western Electric for a supply contract with the expectation that such a contract would be executed by May 1, 1968. Due to the failure of one of the products to meet the tests required by Western Electric, and due to some confusion at Western Electric of the relationship of Beltronics, Eberline, and Capco to each other and which entity should be the contracting party, the Eberline contract was not executed until August 1968. Eberline was the contracting party and the contract expired by its terms on April 30, 1969.

Upon the execution of the supply contract, Capco produced the products and Beltronics took charge of the marketing of the products under the supply contract.

In the course of time, Eberline became dissatisfied with the expense incurred by Beltronics and desired to shift the burden of the sales expense to those doing the selling. As a result of negotiations had in December 1968, King and Peterson agreed to purchase from Eberline all of the Beltronics stock for certain considerations including an agreement by Eberline and Capco that for a period of five years, and an option for a five-year extension, Beltronics would be the exclusive sales representative for the sale of the capacitors and capacitor cases to the telephone industry and would receive a commission of 15% on such sales. In Jan-

uary 1969, written agreements to effect these modifications of the original plan were executed. (Exhibits A and B.)

In its capacity as exclusive sales representative, Beltronics through its President, Mr. King, pursued negotiations for a new supply contract with Western Electric to become effective May 1, 1969, when the then existing supply contract expired.

In late February 1969 at the request of Western Electric, Beltronics submitted a new price quotation for a supply contract for the period from May 1, 1969, to May 1, 1970. Not having heard from Western Electric after the submission of this quotation, King in early April, went to New York to inquire about the new supply contract. On April 2, he was informed by Mr. Tubman of Western Electric, that the supply contract would not be renewed.

King immediately appealed to Mr. Tubman's superior, Mr. Lander, who said he would let King know the following week if anything could be done. When King telephoned Lander the following week, Lander informed him the decision not to renew the supply contract would stand.

At this time, King knew or had reason to believe that the decision of Western Electric not to renew the supply contract was motivated by alleged improper conduct on the part of the King which violated Western Electric policy with regard to

entertainment of and the giving of gifts to its employees. King told Lander that he would resign as President of Beltronics and let Peterson take over if that would save the supply contract. Lander agreed to talk to Peterson and a meeting in New York was scheduled for April 4, 1969.

Eberline and Capco were advised of the situation and arranged for Mr. Vance and Mr. McGonagle (President and Vice President of Eberline) and Mr. Wood, President of Capco to attend the meeting with Mr. Peterson.

At the meeting of April 14, Western Electric spokesmen made it clear that Western Electric would do no further business with Mr. King or Beltronics or anyone associated with them.

Upon Eberline's assurance that its relationship with Beltronics as a subsidiary of Eberline had been terminated and that Eberline would have no association with Beltronics in the future, Western Electric accepted a quotation from Eberline in lieu of the one previously submitted by Beltronics and eventually Eberline received a supply contract from Western Electric.

On April 21, 1969, Eberline and Capco advised Beltronics that because of Western Electric's refusal to do business with Beltronics and Mr. King, Eberline and Capco ". . . have elected to rescind

the captioned agreement (the exclusive sales representative agreement) on the ground, among others, of complete failure of consideration on the part of Beltronics and impossibility of performance by Beltronics." (Exhibit S.)

Eberline and Capco did not comply with the termination provisions of paragraph 16a of the Agreement, which provided for termination prior to the expiration of the ten-year term of the Agreement upon ninety days notice and payment to Beltronics of $75,000.00.

The decision of Western Electric not to renew the Eberline supply contract was made about the middle of March 1969 by Mr. Bredder, then General Manager of purchasing for Western Electric, after reviewing the matter with the Vice President of Purchasing. The decision was made unilaterally by Western Electric without prior consultation with Beltronics, Eberline, or Capco. The decision was first revealed by Mr. Tubman of Western Electric to Mr. King at a meeting with Mr. King in New York on April 2, 1969.

The reasons which motivated Mr. Bredder's decision were three:

1. Alleged violations by Mr. King of Western Electric's entertainment and gift policies;

2. Mr. King's alleged improper acquisition of an "Index of Purchase Contracts" published by Western Electric for internal use and Mr. King's alleged improper use thereof;

3. Uncertainty of the respective roles of Beltronics, Eberline and Capco and confusion as to which should be the contracting party.

VIOLATIONS OF ENTERTAINMENT AND GIFT POLICIES

On February 27, 1969, one S. Frank Artale, an employee in the purchasing organization of Western Electric gave to Western Electric a written statement (Exhibit ZZZ) which among other things, stated that Mr. King, President of Beltronics, had on two occasions paid for a "dinner at the Tower Suite for four people, my mother, father, wife, and myself. I provided verbally to King data concerning price quotes concerning build-out capacitors. I did this at King's suggestion and in a way to more or less pay him back for his hospitality. I presently have from King an additional complimentary charge ticket for the Tower Suite that I had planned to utilize on March 22, 1969."

This was in violation of Western Electric's entertainment policy. King, while admitting some entertainment of Mr. Artale including providing once for dinner

at the Tower Suite for Mr. Artale and his family, denied that he knew that this was in violation of Western Electric's policy.

INDEX OF PURCHASE CONTRACTS

Western Electric publishes monthly, an "Index of Purchase Contracts", which furnishes the names of those having supply contracts with Western Electric. These are distributed to the various purchasing houses of the Western Electric system and this index is used in ordering supplies, equipment, and materials.

After Eberline obtained its supply contract in August 1968, there was a delay in including Eberline's supply contract in the index and it was not until November of 1968 that Eberline was listed.

In the meantime, Mr. King was of the opinion that the absence of Eberline from the index was affecting the volume of orders received by Beltronics. He complained to various Western Electric representatives about the matter including a Mr. Dunton, who was in the purchasing department of Western Electric. Mr. Dunton looked at his copy of the index and noticing that it was not the current one threw it in the waste basket near where Mr. King was sitting. When Mr. King left Mr. Dunton's office, he took the index from the waste basket without asking Mr. Dunton for permission to do so.

Mr. King had Eberline's name inserted on pages 21 and 24 of the index, had the altered pages duplicated and sent them to the buyers of Western Electric houses throughout the country.

Western Electric deemed this to be an improper acquisition of an internal and confidential document and an improper use thereof.

King justified his acquisition and use of the index because Western Electric had not included Eberline in its index after the supply contract was executed.

UNCERTAINTY OF RELATIONS BETWEEN BELTRONICS, EBERLINE AND CAPCO

That there was ground for confusion on the part of Western Electric as to the relationship of these three companies is sustained by the evidence. The supply contract itself designates Beltronics as the manufacturer of the products when the truth is that Capco was the manufacturer and Beltronics was the marketing organization.

The Court finds that Western Electric in March 1969, had reasonable grounds to believe that Mr. King had violated the entertainment and gift policy of Western Electric; that Mr. King had improperly acquired and used the "Index of Purchase Contracts" and that there was uncertainty as to the relationship among Beltronics, Eberline, and Capco.

The Court finds that the decision of Western Electric in March 1969 to refuse to deal with Mr. King or Beltronics or anyone associated with them, including Eberline, was unilaterally made by Western Electric and that it was not made in accordance with any plan, scheme, or design by Western Electric or by Eberline and Capco or by a combination of the three to suppress competition or to restrain or to monopolize trade in violation of the Federal Anti-Trust Laws.

PLAINTIFFS' CLAIMS

The plaintiff has alleged four statements of claim. A summary of each of these claims is found at Page 1 of the plaintiffs' trial brief filed November 5, 1973, and succintly states the nature of each claim. We here incorporate the plaintiffs' summary as a prelude to our conclusions of law.

> "First Claim-Plaintiff Beltronics, Inc. ("Beltronics") charges Defendants Eberline Instrument Corporation ("Eberline") and Capco, Inc. ("Capco") with a breach of an Exclusive Sales Representative Agreement between Beltronics, and Eberline and Capco, Exhibit A to the Complaint, and seeks $75,000.00 plus sales commission of $9,553.97 pursuant to Section 16(a) of that Agreement.
>
> "Second Claim-In the event relief is denied on the First Claim, Plaintiff

Beltronics seeks cancellation of a promissory note given by Beltronics to Capco, and Plaintiffs W. Arther Peterson ("Peterson") and James E. King ("King") seek cancellation of their guarantees of said promissory note, all on the grounds that the consideration for the promissory note and the guarantees thereof has failed.

"Third Claim-Plaintiff Beltronics charges Defendant Western Electric Company, Incorporated ("Western Electric") with maliciously, intentionally, and without legal justification, interfering with the contractual relationship which existed between Beltronics, and Eberline and Capco, which relationship was evidenced by the Exclusive Sales Representative Agreement, Exhibit A to the Complaint, and seeks damages of $650,000.00.

"Fourth Claim-Plaintiff Beltronics charges Defendants Western Electric, Eberline and Capco with violations of Section 1 of the Sherman Act, and Defendant Western Electric with violation of Section 2 of the Sherman Act, and seeks single damages of $650,000.00, trebled to $1,950,000.-00, plus reasonable attorney's fees and costs of suit."

CONCLUSIONS OF LAW

FIRST CLAIM-Breach of Contract.

This claim is predicated on an alleged breach of the Exclusive Sales Agreement (Exhibit A) in that the defendants Eberline and Capco did not terminate the agreement in the manner specified by Section 16a which provides in its pertinent parts as follows:

> "In addition to the option to terminate this Agreement under certain conditions as provided in paragraph 15, Eberline may terminate this Agreement at any time by giving Beltronics notice in writing of termination at least ninety (90) days prior to the termination date and by paying Beltronics the sum of $75,-000.00._ _ _"

Admittedly, Eberline and Capco did not comply with this provision of the contract.

The question is whether or not this constitutes an actionable breach of the contract.

The Court found as a matter of fact that the parties in executing Exhibit A did so upon the basic assumption that Western Electric, which was the only market of any consequence for the products here involved, would continue to be a market for those products and that

without Western Electric as a market the venture could not succeed.

The refusal of Western Electric to deal with Beltronics or Mr. King or with Eberline, so long as it was associated with them, made performance of the Exclusive Sales Agreement impossible.

Upon the facts as found by the Court, the Court concludes as a matter of law that Exhibit A was subject to an implied condition that if, without fault of the parties, the Western Electric market ceased to be available for the sale of the products, the Agreement would be dissolved and the parties excused from performing it.

The Western Electric market was foreclosed by the unilateral action of Western Electric, without fault on the part of Eberline and Capco, and the implied condition of the Agreement caused the Agreement to be dissolved, and excused the parties from further performance. Thus, Eberline and Capco were not required to comply with Section 16a of Exhibit A and their failure to do so does not constitute an actionable breach of the Agreement.

The Court concludes that the plaintiff is not entitled to recover upon its First Claim.

SECOND CLAIM-Cancellation of Note

This claim is an alternative claim in the event the plaintiff is denied relief on the first claim.

The disposition of this claim requires some additional findings of fact.

The second claim for relief seeks a cancellation of a promissory note executed by Beltronics to Capco dated December 31, 1968. The payment of this note was guaranteed by King and Peterson personally in the Agreement of January 1, 1969, (Exhibit B) wherein King and Peterson agreed to purchase all of the stock of Beltronics from Eberline and Capco.

The Court finds from the evidence that in the course of its operations as a subsidiary of Eberline, Beltronics became indebted to Capco and that the parties agreed that the amount of such indebtedness as of December 31, 1968, was $21,-970.85, and to evidence that indebtedness, Beltronics executed and delivered to Capco its promissory note for that amount dated December 31, 1968. The execution of the note was a recognition by Beltronics of the indebtedness of Beltronics to Capco existing at that time.

The Court further finds that King and Peterson prior to the execution of the purchase of stock agreement of January 1, 1969, (Exhibit B) had no personal liability for that indebtedness. By the terms

of the purchase agreement (Exhibit B) King and Peterson personally guaranteed the payment of the note.

The Court finds that the obligation of Beltronics upon the promissory note which it executed on December 31, 1968, is supported by adequate consideration received by Beltronics prior to the execution of Exhibit B in January of 1969.

Upon the facts as found by the Court, the Court concludes as a matter of law that Beltronics is not entitled to a cancellation of the note and the indebtedness represented thereby and the counterclaim of Capco for judgment on the note against Beltronics should enter.

SECOND CLAIM-Cancellation of the Personal Guarantee of King and Peterson

Prior to the execution of the purchase agreement of January 1, 1969, (Exhibit B) whereby King and Peterson agreed to purchase the Beltronics stock from Eberline, King and Peterson had no personal liability for the debts of Beltronics.

The purchase agreement (Exhibit B) provides:

> "In consideration of the mutual agreement wherein Buyers (King and Peterson) recognize this obligation (the note) on behalf of Beltronics and jointly, severally, and personally guarantee payment of the aforesaid note."

This is the only basis for a personal liability of King and Peterson to pay the indebtedness represented by the note.

We have previously found that from its inception, the venture entered into between Beltronics, Eberline, and Capco was based on the assumption that a supply contract with Western Electric would be obtained and maintained.

This basic assumption remained the foundation for the dealings of the parties in January 1969, when the parties executed Exhibit B whereby King and Peterson agreed to purchase the stock of Beltronics and when the parties executed Exhibit A, the exclusive sales representative agreement.

From the evidence, the Court finds that the consideration for the guarantee by King and Peterson was the exclusive sales agreement which the parties assumed would remain in force and effect for a minimum of five years and a maximum of ten years.

Upon these facts, the Court concludes as a matter of law that there was a failure of consideration for the guarantee of the note by King and Peterson and they are entitled to judgment for cancellation of their guarantee.

THIRD CLAIM

The third claim seeks to recover from Western Electric damages for a wrong-

ful, malicious, and intentional inducement of a breach of the exclusive sales agreement between Beltronics and Eberline and Capco. Upon the facts as found by the Court, the Court concludes as a matter of law that the plaintiff is not entitled to recover upon its third claim; that the refusal of Western Electric to deal with the plaintiff or anyone associated with it was an exercise of a legal right and such refusal was not illegal or unlawful, was not tortious and is not actionable.

FOURTH CLAIM-Anti-Trust Violations

Under the facts as found by the Court, the Court concludes as a matter of law that the plaintiff is not entitled to recover upon its fourth claim based on alleged violations of Sections 1 and 2 of the Sherman Act.

The facts as found by the Court do not support plaintiff's allegations that Western Electric, Eberline, and Capco contracted, combined, or conspired in restraint of interstate trade in violation of Section 1 of the Sherman Act; or that they contracted, combined, or conspired in a group boycott of Beltronics in violation of Section 1 of the Sherman Act; or that Western Electric in providing a source of supply of capacitors for the Bell system, exercised a monopoly power in violation of Section 2 of the Sherman Act.

Upon the facts as found by the Court, the Court concludes as a matter of law:

A. That Western Electric had a legal right not to deal with Beltronics and its exercise of that right did not violate Sections 1 or 2 of the Sherman Act.

B. That the acts of the defendants as found by the Court did not constitute a violation of Sections 1 or 2 of the Sherman Act.

C. Assuming arguendo that the acts of the parties or any of them were in violation of either Sections 1 or 2 of the Sherman Act, the injury and damage suffered by the plaintiff were not proximately caused by any unlawful restraint or monopolization of trade in violation of Sections 1 and 2 of the Sherman Act, but were proximately caused by Western Electric's exercise of its legal right to refuse to deal with Beltronics or with Eberline and Capco so long as they were associated with Beltronics.

D. That the plaintiff is not entitled to recover on its fourth claim for relief.

ORDER

It is therefore ordered, adjudged and decreed, that judgment of dismissal of all claims of Beltronics shall be entered and that the defendants have judgment against Beltronics for their costs to be

taxed by the Clerk of the Court upon the filing of a Bill of Costs.

It is further ordered, adjudged, and decreed that the guarantee by the plaintiffs, King and Peterson, of payment of the promissory note executed by Beltronics to Capco, Inc. dated December 31, 1968, in the principal amount of $21,970.85, is hereby set aside and cancelled and said plaintiffs are absolved from any obligation for the payment of that indebtedness by virtue of their guarantee. King and Peterson shall have judgment against Capco, Inc. for their costs to be taxed by the Clerk of the Court upon the filing of a Bill of Costs.

It is further ordered, adjudged, and decreed that judgment be entered in favor of Capco, Inc. and against Beltronics for the indebtedness represented by the promissory note executed by Beltronics to Capco, Inc. and dated December 31, 1968, which amount has been stipulated by the parties to be $8,617.11 after allowing all just credits, together with the interest accrued thereon. Judgment shall be entered upon the surrender to the Clerk of this Court of the original promissory note and a stipulation by the interested parties of the interest due and owing upon the agreed principal amount.

(Filed December 4, 1974)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1044, November Term, 1974

BELTRONICS, INC., Plaintiff-Appellant,
v.
EBERLINE INSTRUMENT CORPORATION, CAPCO, INC. and WESTERN ELECTRIC COMPANY, INCORPORATED, Defendants-Appellees.

Appeal From the United States District Court For the District of Colorado
(D. C. No. C-1598)

Dwight A. Hamilton and John T. Willson (Fuller and Evans, on brief) for Plaintiff-Appellant.

Robert C. Poole (Marshall G. Martin, Robert W. Harris and Poole, Tinnin, Danfelser & Martin, on brief), for Defendants-Appellees Eberline Instrument Corporation and Capco, Inc.

Stuart S. Gunckel (Rovira, DeMuth & Eiberger and Akolt, Dick & Akolt, on brief), for Defendant-Appellee Western Electric Company, Incorporated.

Before: BREITENSTEIN, HILL and Mc WILLIAMS, Circuit Judges.

BREITENSTEIN, Circuit Judge. This suit was brought in Colorado state court as a contract case and was removed to federal court on diversity grounds. After removal, Western Electric Company, Inc., was added as a defendant and the complaint was amended to charge anti-trust violations. The district court held for defendants and plaintiff Beltronics, Inc., has appealed. We affirm.

Beltronics, Inc., is a Colorado corporation and is the successor to Midwec Sales Co. W. Arthur Peterson and James E. King are officers of Beltronics and were officers of Midwec Sales.

Eberline Instrument Corp., defendant-appellee, is a New Mexico corporation, and has a wholly owned subsidiary, Capco, Inc., a Texas corporation, which is also a defendant-appellee.

Western Electric Company, Inc., a New York corporation and defendant-appellee, is a wholly owned subsidiary of American Telephone and Telegraph Company (AT&T) which as the Bell Telephone System has 23 operating companies. The Bell System provides over 80% of the telephone service in the United States.

The products involved in the transactions among the parties will be referred to as capacitors.

In 1960 Midwec Sales, controlled by Peterson and King, became the exclusive representative of a Nebraska manufacturer in the sale of capacitors. Midwec Sales sold capacitors to Bell System operating companies until 1967. In 1961 Western gave notice that the magnitude of capacitor sales to Bell System operating companies required development of specifications for capacitors and a supply contract with Western. Specifications were prepared and a supply contract executed. In 1966 Western determined that a second supplier of capacitors was needed to avoid over-dependence on one source. The contract between the Nebraska manufacturer and Midwec Sales was terminated in 1967. King proposed to Eberline that it manufacture capacitors and become the second supply source for Western. Eberline acquired Capco, to make the capacitors, and all the stock of Midwec Sales, the name of which was changed to Beltronics. Beltronics was made the marketing agent for capacitors produced by Capco. Peterson and King were the principal officers of Beltronics. The contract with Eberline was the only substantial asset of Beltronics.

In January 1969 Eberline sold its Beltronics stock to Peterson and King and made a 5-year renewable contract with Beltronics by which Beltronics became

Eberline's exclusive sales agent for the sale of capacitors to the telephone industry. Beltronics' commission on those sales was 15%.

The Western-Eberline contract was due to expire April 30, 1969. Beltronics submitted a new price quotation for a 1-year renewal contract. In April, 1969, Western told Beltronics that the Eberline supply contract would not be renewed. The decision resulted from King's conduct violating Western policies.

At a New York meeting on April 14 Wesern made clear that it would do no further business with King, Beltronics, or anyone associated with them. Eberline terminated its contract with Beltronics and later secured a new supply contract from Western Electric.

Beltronics then sued for breach of contract, tortious interference with contract relations, and antitrust violations by Western, Eberline, and Capco. After a two-week trial the district court made comprehensive findings of fact and conclusions of law. Some of the issues resolved are not pertinent to this appeal.

I

The January 2, 1969, "Exclusive Sales Representative Agreement" made by Eberline and Capco with Beltronics was for five years and was renewable at the option of Beltronics for another five years.

Paragraph 15 provided for termination at the option of Eberline under conditions which relate to sales performance by Beltronics and production capacity of Eberline. Eberline claims no right to terminate under this provision. The controversy concerns the following portion of paragraph 16(a):

> "In addition to the option to terminate this Agreement under certain conditions as provided in paragraph 15, Eberline may terminate this Agreement at any time by giving Beltronics notice in writing of termination at least ninety (90) days prior to the termination date and by paying Beltronics the sum of $75,-000.00, ***."

Eberline did not give 90 days' notice and did not pay the $75,000.

We reject Beltronics' attack on the findings of the trial court. They have record support and are not clearly erroneous. The court found that Western's refusal to renew the capacitor supply contract was caused by King's violation of Western's entertainment and gift policies, and his improper acquisition and use of a Western publication intended for internal information. The Western decision was made unilaterally without participation by Eberline or Capco.

The question is whether the termination by Eberline and Capco without notice or payment to Beltronics was an actionable breach. The trial court found: (1) The contract was made on the assumption that the Western market for capacitors would continue. (2) The refusal of Western to deal with Beltronics made performance impossible. (3) The contract was subject to the implied condition that if without fault of the parties the Western market became unavailable, "the Agreement would be dissolved and the parties excused from performing it." (4) The Western market was foreclosed by the unilateral action of Western "without fault on the part of Eberline and Capco." (5) The implied condition of the contract caused it "to be dissolved, and excused the parties from further performance." Accordingly, the court held that termination by Eberline and Capco was not an actionable breach.

We reject Beltronics' argument that the situation is covered by contract ¶15. That provision contemplated sales activities by Beltronics. That activity was ended by the unilateral action of Western. Paragraph 16(a) is in effect a buy-out clause. When Western refused to do business with Beltronics, nothing remained for Eberline to buy.

The unilateral decision of Western not to do business with Beltronics destroyed all possibility of performance. It makes no difference whether the issue be labeled

"impossibility," "failure of consideration," or "commercial frustration" because the crucial inquiry is whether the equities of the case place the risk on Beltronics or Eberline. Lloyd v. Murphy, Calif., 153 P.2d 47, 50. We have a supervening event caused by the conduct of Beltronics without any contributory fault on the part of Eberline. See 6 Corbin, Contracts, §1354, pp. 458-459, and Restatement, Contracts, §457, p. 849. The inability of Beltronics to make sales to Western made the contract inoperative. See Winans v. Landstrom Furniture Corporation, 7 Cir. 132 F.2d 457, 459.

The arguments of Beltronics that the $75,000 payment was for services rendered and to reimburse for the purchase by King and Peterson of the Beltronics stock are without record support.

The Western-Eberline contract required Eberline to make the capacitors in accordance with Western's specifications, to incorporate only cable sold to it by Western, and to use that cable for no other purpose. Beltronics argues that to relieve Eberline from performance sanctions a restraint of trade, and that the defense of impossibility is unavailable because Eberline agreed to restrictive provisions which made Beltronics' performance impossible. Beltronics negotiated the agreement which contained the restrictions. The evidence does not support the claim that, absent the restrictions, Beltronics could have sold to

other Bell System companies. Beltronics' loss was not caused by the restrictions but by its own conduct which resulted in Western's decision to stop business relations.

II

Beltronics asserts that Western tortiously interfered with the Beltronics-Eberline contract and intentionally induced a breach thereof. We have held that no breach occurred. The issue then is whether Western wrongfully interfered with the contract relationship. We take the findings of the trial court to be that whatever interference occurred was justified. Beltronics does not deny the actions of King which caused the Western decision. Indeed, Beltronics concedes that Western had the right to end its dealing with Beltronics. It argues that King's actions bore upon the Western-Beltronics, not the Eberline-Beltronics, relationship. This does not follow because Western could legitimately refuse to purchase, either directly or indirectly, from or through Beltronics. Determination of "unwarranted interference" depends on the facts of each case, Watson v. Settlemeyer, Colo. 372 P.2d 453, 456, and is a question for the fact finder. See Order of Railway Conductors v. Jones, Colo. 239 Pac. 882, 883. The record sustains the trial court and we agree that Western was guilty of no tortious interference.

III

We turn to the antitrust claims. Beltronics argues that the restrictions in the Western-Eberline contract on the purchase of cable and the sale of capacitors made with that cable constitute a per se violation of §1 of the Sherman Act, 15 U. S. C. §1, within the holding in United States v. Arnold, Schwinn & Co., 388 U.S. 365. Schwinn was concerned with a contract between a producer and a distributor in which the producer imposed restrictions on resales by the distributors and retailers. We are not concerned with a vertical relationship such as that in Schwinn. The Court there was concerned with the anticompetitive effects of a manufacturer's restrictions downstream in the channels of distribution.

We are concerned with an agreement for the sale by Western to Eberline of cable and the sale of capacitors by Eberline to Western. In Schwinn the manufacturer parted with dominion, and the restrictions on sale affected transaction by distributors and retailers. In our case we have no impediment to competition. Eberline purchased cable from Western, used the cable in making capacitors, and sold the capacitors to Western. In effect Western bought the cable back, albeit in a different form. Schwinn has no application. The record discloses no restraint of trade in violation of the Sherman Act. In any event we find noth-

ing in the record to show that Beltronics was, or could have been, damaged by the restrictions.

IV

Beltronics also argues that a per se Sherman Act violation is established because it was the victim of a group boycott by Western and Eberline. Reliance is placed on Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207. Broadway-Hale, a powerful competitor of Klor's, instigated a wide combination of manufacturers and distributors to sell not at all, or on highly disadvantageous terms, to price-cutting Klor's.

Klor's is not pertinent, and we find no evidence of any group boycott here. There is no combination, either horizontal or vertical, to exclude competitiors or influence the trade practices of a boycott victim. See Worthen Bank & Trust Co. v. National BankAmericard, Inc., 8 Cir., 485 F.2d 119, 124, cert. denied, 42 LW 3468. Instead of the elimination of a competitor at some level, we have the elimination of a non-competing middleman. See Bushie v. Stenocord Corp., 9 Cir., 460 F.2d 116.

There is no unreasonable restraint of trade here. Western was free to buy capacitors from anyone. Its selection of Eberline cannot be stretched into a claim

of a §1 violation. Beltronics' admitted violation of Western policies caused the Western decision to end the relationship. There is no intimation of any connivance with Eberline or anyone else.

Affirmed.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term - December 31, 1974

Before Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, and Honorable Robert H. McWilliams, Circuit Judges.

No. 74-1044

BELTRONICS, INC., a Colorado corporation,
Plaintiff-Appellant,

W. ARTHUR PETERSON, and JAMES E. KING,
Plaintiffs,

v.

EBERLINE INSTRUMENT CORPORATION,
a New Mexico corporation, and
CAPCO, INC., a Texas corporation,
WESTERN ELECTRIC COMPANY, INC.,
a New York Corporation,
Defendants-Appellees.

This matter comes on for consideration of Appellant's Petition for Rehearing filed in the captioned cause.

Upon consideration whereof, the Petition for Rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

LIBRARY
PREME COURT, U. S.

No. 74-1232

Supreme Court, U. S.
FILED
MAY 12 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

BELTRONICS, INC., Petitioner,

v.

EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.
and
WESTERN ELECTRIC COMPANY, INCORPORATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS EBERLINE INSTRUMENT CORPORATION AND CAPCO, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT C. POOLE
MARSHALL G. MARTIN
816 Bank of New Mexico Building
Albuquerque, New Mexico 87102

Attorneys for Respondents
Eberline Instrument Corporation
and Capco, Inc.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Denying Writ	8
I. THE *SCHWINN* DOCTRINE CLAIM WAS OUTSIDE THE SCOPE OF PETITIONER'S PLEADINGS, AN UNCURED DEFECT WHICH HAS NOT BEEN RAISED IN THE PETITION FOR A WRIT OF CERTIORARI	9
II. UNDER THE FACTS FOUND BY THE TRIAL COURT AND UPHELD BY THE COURT OF APPEALS, THERE IS NO CONFLICT BETWEEN THE DECISION OF THE LOWER COURTS AND *UNITED STATES V. ARNOLD SCHWINN & CO.*	12
III. WITH RESPECT TO THE ALLEGED *SCHWINN* CLAIM, THERE IS NO BASIS FOR REVIEW OF THE LOWER COURT'S HOLDINGS WITH RESPECT TO EBERLINE	14
IV. THE FACTUAL BASES FOR THE LOWER COURTS' FINDINGS AND CONCLUSIONS THAT NO DAMAGE COULD BE OR WAS CAUSED TO BELTRONICS PRECLUDES ANY CONTENTION THAT THE	

Page

COURT OF APPEALS' DECISION CONFLICTS WITH *PERKINS V. STANDARD OIL COMPANY OF CALIFORNIA* 16

V. THE LOWER COURT'S HOLDINGS ARE ALTERNATIVE HOLDINGS, HOLDING NOT ONLY THAT NO *SCHWINN* CLAIM WAS ASSERTED OR ESTABLISHED AND THAT DEFENDANT'S CONDUCT DID NOT CONTRIBUTE TO ANY INJURY OF PETITIONER, BUT ALSO HOLDING THAT THERE WAS NO COMPETENT EVIDENCE TO SHOW THAT PETITIONER WAS DAMAGED IN ANY EVENT 18

Conclusion 20

TABLE OF AUTHORITIES

Cases: *Page*

Albrecht v. Harold Co.
452 F.2d 124 (8th Cir. 1971) 19

Billy Baxter, Inc. v. Coca Cola Co.
431 F.2d 183 (2d Cir. 1970) *cert. denied,*
401 U.S. 923 (1970) 18

Beltronics, Inc., et al v. Eberline Instrument Corporation, et al.
369 F. Supp. 295 (D. Colo. 1973) ... 1, 3, 7, 11, 13, 14, 16

Beltronics, Inc. v. Eberline Instrument Corporation, et al.
509 F.2d 1316 (10th Cir. 1974) .. 2, 3, 6, 11, 13, 14, 15, 16

Colorado Pump & Supply Co. v. Febco, Inc.
472 F.2d 637 (10th Cir. 1973) *cert. denied,*
411 U.S. 987 (1973) 10

Continental Baking Co. v. Utah Pie Co.
396 F.2d 161 (10th Cir. 1968) *cert. denied,*
393 U.S. 860 (1968) 19

Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.
459 F.2d 138 (6th Cir. 1972) 19

Farmington Dowell Products Co. v. Forester Mfg. Co.
421 F.2d 61 (1st Cir. 1969) 19

Gustafson v. General Motors Acceptance Corporation
470 F.2d 1057 (8th Cir. 1973) 19

Klors, Inc. v. Broadway-Hale Stores, Inc.
359 U.S. 207 (1959) 11

In Re Multidistrict Vehicle Air Pollution MDL No. 31
481 F.2d 122 (9th Cir. 1973) *cert. denied,*
414 U.S. 1045 (1973) 17

Page

Perkins v. Standard Oil Company of California
395 U.S. 642 (1969) 8, 9, 15, 17

Riebert v. Atlantic Richfield Co.
471 F.2d 727 (10th Cir. 1973) *cert. denied*,
411 U.S. 938 (1973) 18

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd.
416 F.2d 71 (9th Cir. 1969) *cert. denied*,
396 U.S. 1062 (1970) 19, 20

United States v. Arnold Schwinn & Co.
388 U.S. 365 (1967) 8, 10, 11, 12

Volasco Products Co. v. Lloyd A. Frye Roofing Co.
308 F.2d 383, 392 (6th Cir. 1962) *cert. denied*,
372 U.S. 907 (1963) 19

Wyoming Construction Co. v. Western Casualty & Surety Co.
275 F.2d 97 (10th Cir. 1960) *cert. denied*,
362 U.S. 976 (1960) 9

Statutes:

15 U.S.C. ¶1 ..... 4, 10

15 U.S.C. ¶15 17

Other Authorities:

3 J. MOORE, FEDERAL PRACTICE (2d Ed. 1974) .. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

BELTRONICS, INC., Petitioner,
v.
EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.
and
WESTERN ELECTRIC COMPANY, INCORPORATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS EBERLINE INSTRUMENT CORPORATION AND CAPCO, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents pray that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit be denied.

OPINIONS BELOW

The opinion of the district court is reported in *Beltronics, Inc., et al. v. Eberline Instrument Corporation, et al.*, 369 F. Supp. 295 (D. Colo. 1973) [hereinafter cited as "Beltronics I"], and was affiirmed by the Court of Appeals for the Tenth Circuit in *Beltronics, Inc. v. Eberline Instrument Corpora-*

tion, et al., 509 F.2d 1316 (10th Cir. 1974) [hereinafter cited as "Beltronics II"]. For the Court's convenience citations to pages of the petition appendix will also be given.[1]

JURISDICTION

The jurisdictional requisites are adequately recited in the Petition.

QUESTIONS PRESENTED

Respondents Eberline Instrument Corporation and Capco, Inc. (hereinafter referred to collectively as "Eberline" or, where appropriate, individually as "Eberline" or "Capco") respectfully submit that the Questions Presented by Petitioner are inappropriate in that they contain factual or procedural issues resolved against Petitioner by the trial court and either affirmed by the United States Court of Appeals for the Tenth Circuit or not challenged on appeal, as follows:

1. Petitioner's Question No. 1 describes an anti-trust claim which the trial court held to be outside the scope of the pleadings, and the claim was therefore not litigated at trial. (See Statement of the Case, *infra.*) The Court of Appeals did not disturb the trial court's holding.

2. Petitioner's Question No. 1 expressly assumes that Eberline could directly sell the ultimate product, a telephone instrument component called a capacitor, to the Bell Com-

[1]References to the Appendix to Petitioner's PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT will be cited as "App._____". References to the appendix of the record filed with the Court of Appeals, lodged with the Clerk of the Court, will be referred to as "RA_____".

panies. Petitioner conceded in its Brief of Appellants in the Court of Appeals for the Tenth Circuit that the Bell Companies' parent preferred that all Bell Companies' purchases pass through AT&T's wholly-owned subsidiary, Western Electric, and that they be approved by Bell Laboratories. (Apnt. Br., Ct. App. at p. 12; RA 465-466)

3. Petitioner's Question No. 2 also assumes facts not found by the trial court. There is no finding below that Western Electric, the so-called "first manufacturer", used its alleged market control through the alleged restrictions in this case to prevent competition with it for sales to the so-called ultimate consumer, the Bell Companies. Nor is there a finding that Western Electric "forced" Eberline to terminate Beltronics' contract. The District Court found that Western Electric refused to do business with Petitioner Beltronics because Western Electric had reasonable grounds to believe that a Beltronics' principal had acted in violation of Western Electric's purchasing policies. *Beltronics I*, 369 F. Supp. at 300 (App. 9a-10a) The Court of Appeals for the Tenth Circuit correctly reported that Beltronics negotiated the agreement which contained the alleged restrictions about which Beltronics complains, and Beltronics' own conduct resulted in Western Electric's decision to stop the business relationship. *Beltronics II*, 509 F.2d at 1319 (App. 29a-30a)

4. Petitioner's Question No. 3, although denominated subsidiary by Petitioner, overlooks the fact that the experienced trial judge below considered Plaintiff's evidence concerning damage to be wholly speculative and refused to admit it in evidence.

STATUTES INVOLVED

The statutory provisions involved are adequately presented in the Petition.

STATEMENT OF THE CASE

Respondents Eberline and Capco controvert Petitioner Beltronics' statement of the case since it is materially incomplete.

Beltronics' statement of the case fails to state that Beltronics' claim that defendants had violated Section 1 of the Sherman Act by virtue of purported resale restrictions on Western Electric cable (hereinafter referred to for convenience as the "Schwinn claim") was never properly pleaded to the trial court, was properly excluded from the pretrial order, and was accordingly never litigated in the trial court. The petitioner fails to discuss key findings of fact and conclusions of law of the trial court, which were left undisturbed by the Court of Appeals.

The instant case began on June 23, 1969 as a state court contract action in which Beltronics sought damages from Eberline and Capco for breach of an Exclusive Sales Representative Agreement, dated January 2, 1969. (RA 73) Subsequently, after removal to the United States District Court for the District of Colorado and after the case was at issue, Beltronics, Inc. was allowed to add Western Electric as a party and raise a "group boycott" antitrust claim under the complaint's Fourth Claim filed on March 31, 1970. (RA 49) In December, 1970, Beltronics, Inc. was permitted to file an Amended Fourth Claim. This represented the second amendment of the original complaint. Later, in June, 1972, Beltronics filed a further motion for leave to amend its Amended Fourth Claim. (RA 148) In this third attempted amendment Beltronics asserted, for the first time, that Defendants had violated Section 1 of the Sherman Act by virtue of purported resale restrictions on Western Electric cable, Petitioner's purported *Schwinn* claim. (RA 155)

In September, 1972 the Court denied Beltronics' motion for leave to amend the Amended Fourth Claim to assert the *Schwinn* claim. During trial, District Judge Hatfield Chilson explained that the motion to amend for the third time was denied because Beltronics had been allowed to amend its Complaint on previous occasions and the case was over three years old at the time the motion was denied. (RA 335, 461-462) The case was tried under a Pre-Trial Order which did not include the *Schwinn* claim now asserted in Petitioner's petition for certiorari. (RA 173) Evidence concerning the alleged resale restrictions and the *Schwinn* claim was not admitted in evidence. (RA 333-335, 459-463, 525-530)

Eberline became a party to dealings with Western Electric by virtue of its purchase of all the outstanding stock of Beltronics in 1968. Beltronics acted as Eberline's exclusive sales agent for capacitors in sales to Western Electric. Later, in January, 1969, all of Beltronics' stock was resold to its former shareholders, Messrs. King and Peterson. (RA 31) Thereafter, as before, Beltronics acted as an exclusive sales agent for Eberline and Capco under an Exclusive Sales Representative Agreement. (RA 14) The Exclusive Sales Represenetative Agreement was later cancelled by Eberline, bringing about the instant litigation.

In support of its asserted *Schwinn* claim, Petitioner argues that title to and dominion over the Western Electric cable passed to Midwec Corporation under Midwec's previous supply contract with Western Electric. (Petition at p.8) The assertion is inapplicable and misleading because there were no such findings concerning the Western Electric-Eberline supply contract, Contract No. G 82331 D, which was in force from August 1, 1968 through April 30,

1969, and the evidence is insubstantial on that point. (RA 969-976) Supply Contract G 82331 D committed Western Electric to purchase Eberline products made with its cable and provided that Western Electric would sell cable to Eberline to be used in Eberline's manufacture of the capacitor products sold to Western Electric as follows:

> We [Western Electric] agree to sell and you [Eberline] *agree to purchase, at the prices* indicated below, the following material. This material is to be used solely for the performance of this contract. [referring to the Supply Contract] (RA 969, 972)

The Western Electric commitment to purchase and the so-called restriction are in one integrated supply contract under which Western Electric was buying capacitors. There is no assertion by Petitioner, and no record evidence, that any dispute ever arose over these provisions prior to Petitioner's attempted amendment of its Fourth Amended Claim, or that Western Electric ever enforced any restriction pertaining to the Western Electric cable. These contract provisions do indicate that Eberline did not acquire the normal indicia of title, or "dominion" over the cable, since Eberline could only use the cable in the manufacture of products it resold to Western Electric under the contract. As the Court of Appeals specially noted, the supply contract was negotiated by Beltronics. *Beltronics II*, 509 F.2d at 1319 (App. 29a) Contrary to the assertion at p.8 of the Petition, there have been no findings by the District Court, or the Court of Appeals, that title, dominion over and risk of loss of Western Electric's cable passed to Midwec, Beltronics or Eberline. No such allegations were set forth in the Amended Fourth Claim and the supply contract between Eberline and Western Electric effectively retains to Western Electric the dominion over the cable to be used in filling the contract.

It also commits Western Electric to repurchase the supplied cable on an as-ordered basis in the form of capacitors. (RA 969)

Petitioner also fails to note that the trial court found that Western Electric's decision to terminate its relationships with Petitioner Beltronics was unilateral and was based solely upon Beltronics' violation of entertainment and gift policies of Western Electric, a Beltronics' principal's unauthorized taking and improper use of a Western Electric internal document, and uncertainty of the respective roles of Beltronics, Eberline and Capco and confusion as to which should be the contracting party. The trial court found that the Western Electric decision "was made unilaterally by Western Electric without prior consultation with Beltronics, Eberline or Capco," *Beltronics I*, 369 F. Supp. at 300 (App. 9a), and "was not made in accordance with any plan, scheme or design by Western Electric or by Eberline and Capco or by a combination of the three to suppress competition or to restrain or monopolize trade in violation of the Federal Anti-Trust Laws." *Beltronics I*, 369 F. Supp. at 301 (App. 13a)

Petitioner also fails to discuss the trial court's finding, left undisturbed by the Court of Appeals, that the purpose of specifications in the Western Electric-Eberline supply contract, such as the provisions requiring use of the Western Electric cable, is to control the quality of the finished products sold to Western Electric and supplied to the telephone companies. *Beltronics I*, 369 F. Supp. at 297 (App. 3a)

Petitioner on p.8 of its Petition asserts that it "sold" capacitors. The record is clear that at no time material here did Petitioner act as anything but a sales representative. (RA 616-619)

REASONS FOR DENYING WRIT

Supreme Court Rule 19 states that a petition for writ of certiorari will be granted only where there are special and important reasons for granting the petition. No such reasons are evident here. Petitioner Beltronics contends that the Court of Appeals incorrectly distinguished *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). It has also contended that the Court of Appeals' decision that Beltronics was not and could not have been damaged by the restrictions is in conflict with *Perkins v. Standard Oil Company of California*, 395 U.S. 642 (1969). Petitioner's arguments that this case deserves the exercise of this Court's discretion to grant the petition are without legal or factual substance.

The trial court's findings and conclusions, affirmed on appeal, clearly support the court's decision and the decision does not result in any new or distinctive rule of law in conflict with any decision of this Court.

Respondents Eberline's and Capco's position that the petition should be denied can be summarized as follows:

1. The trial court's decision, not overturned on appeal, that an amendment to include the *Schwinn* claim should not be allowed avoids any conflict between the lower court's rulings and opinions and the *Schwinn* doctrine.

2. Because of the distinctive factual situation and contractual relationships involved in the case, as found by the District Court, and affirmed by the Court of Appeals, there is no conflict between the decision of the Court of Appeals and this Court concerning the *Schwinn* case.

3. The *Schwinn* case has no application to Eberline under the trial court's unchallenged and undisturbed findings.

4. There is no conflict between the decisions of the trial court and Court of Appeals and this Court's decision in *Perkins v. Standard Oil Company* in view of the findings of the trial court, affirmed by the Court of Appeals.

5. The decisions below are based on alternative holdings, and even if one of the alternative holdings may be incorrect the decisions are correct and therefore the Court is unlikely to reach any issue of substantial importance.

I.

THE *SCHWINN* DOCTRINE CLAIM WAS OUTSIDE THE SCOPE OF PETITIONER'S PLEADINGS, AN UNCURED DEFECT WHICH HAS NOT BEEN RAISED IN THE PETITION FOR A WRIT OF CERTIORARI.

The District Court refused to include the *Schwinn* claim in the Pre-Trial Order or permit evidence in support of the claim to be introduced because of several previous amendments of the complaint and the long pendency of the case. (RA 153; 461-462; 333-335; 459-463; 525-530). These rulings were not reversed by the Court of Appeals. Under established appellate practice, the lower courts' discretionary rulings are not to be lightly overturned. Thus, Petitioner Beltronics should now be bound by the pleadings of its Amended Fourth Claim and the pleadings do not include the *Schwinn* claim it now asserts. *Wyoming Construction Co. v. Western Casualty & Surety Co.*, 275 F.2d 97 (10 Cir. 1960), *cert. denied*, 362 U.S. 976 (1960). *See, also*, 3 J. MOORE, FEDERAL PRACTICE ¶15.08[4], at 895, n.1 (2d Ed. 1974), and cases cited therein.

Beltronics' Amended Fourth Claim, upon which the case was tried, did not contain the elements of a *Schwinn* type violation. The *Schwinn* claim was not asserted until almost 3 years after Petitioner started the case, when it moved to amend to state its Second Amended Fourth Claim. (RA 148) In the Amended Fourth Claim Petitioner made no allegations that the Western Electric-Eberline supply contracts (which Petitioner negotiated) prohibited resale of the subject products to parties other than Western Electric; there was no allegation that, under the supply contract, Western Electric parted with title, dominion and risk of loss of the cable; there was no allegation that the cable resale restriction involved customer or territorial limitations, or that the restriction was resolutely insisted upon or enforced. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) at 372, 379; *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637 (10th Cir. 1973), *cert. denied*, 411 U.S. 987 (1973).

The only control alleged over the sales of the subject products to the Bell System Companies in the Fourth Amended Claim is a control allegedly maintained through the cooperation of the Bell System Companies in ordering only from suppliers approved by Western Electric. (Complaint, ¶¶37, 45; RA 103, 104, 106) The Amended Fourth Claim does not contend that the Bell Companies are co-conspirators nor, as indicated above, does the Amended Fourth Claim mention the cable resale restriction. (Compare Petitioner's Second Amended Fourth Claim at ¶47(d), RA 155). The Amended Fourth Claim upon which the case was tried is based solely upon the theory that the Sherman Act, Section 1, was violated by an alleged group boycott or concerted refusal to deal on the part of Western Electric and Eberline. (¶¶46, 47, RA 106-107) The group boycott issue is not raised in Petitioner Beltronics' Petition here and is an issue ex-

plicitly found against Petitioner as to matters of fact and law by the courts below. (*See, e.g., Beltronics I*, 369 F. Supp. at 301, 303-304; *Beltronics II*, 509 F.2d at 1320; App. 13a; 20a-21a; 32a).

The case of *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) [cited hereinafter as "*Klors*"], was principally relied on by Petitioner in the District Court and the Court of Appeals, but Petitioner has abandoned its *Klors* claim here. Of course, a *Klors* violation has very different elements from a *Schwinn* claim and requires very different evidence in proof or defense. A *Klors* type case must involve a group boycott or concerted refusal to deal involving a competitor of the plaintiff. By contrast, a *Schwinn* type case requires customer or territorial restrictions on those in the vertical distribution chain ("downstream" [*Beltronics II*, 509 F.2d at 1320; App. 31a]) where the manufacturer has parted with title to, dominion over and risk of loss of the goods in question and resolutely insists on the restrictions. *Schwinn*, 388 U.S. at 372, 375, 378-379. In short, Petitioner's *Schwinn* theory is an after-thought, now ripened to its only hope for relief. But, Petitioner's pleadings do not permit the raising of *Schwinn* issues at the late stages of the litigation.

Were the decisions of the trial court and Court of Appeals remanded, the Petitioner would still face the hurdle of convincing the trial court that its Second Amended Fourth Claim should be permitted in order to allow presentation of a *Schwinn* claim. Unless this Court now orders allowance of the belated amendment, there is no reason to believe that the trial court would reverse itself if it would again be faced with a third attempted substantive amendment of the original Complaint asserting a new and different type of alleged violation of the Sherman Act requiring additional discovery in a case now almost 6 years old.

The Court of Appeals did not reverse the trial court's refusal to permit such amendment. Instead it went directly to its view that, under the facts found by the trial court, *Schwinn* had no application. Therefore, review by the Supreme Court would not solve the Petitioner's underlying problem that a further amendment to the pleadings will be necessary before the *Schwinn* doctrine can be presented.

II.

UNDER THE FACTS FOUND BY THE TRIAL COURT AND UPHELD BY THE COURT OF APPEALS, THERE IS NO CONFLICT BETWEEN THE DECISION OF THE LOWER COURTS AND *UNITED STATES V. ARNOLD SCHWINN & CO.*

In *Schwinn* this Court found that Schwinn had been "firm and resolute" in insisting upon observance of territorial and customer limitations and that Schwinn had parted with title, dominion over the product and risk of loss. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) at 372, 379. *Schwinn* also involved a sophisticated marketing structure composed of intermediate wholesalers and franchised retailers. The Court of Appeals, in distinguishing *Schwinn*, stated that:

> *Schwinn* was concerned with a contract between a producer and a distributor in which the producer imposed restrictions on resales by the distributors and retailers. We are not concerned with a vertical relationship such as that in *Schwinn*. The Court there [in *Schwinn*] was concerned with the anticompetitive effects of a manufacturer's restrictions *downstream* in the channels of distribution.
>
> We are concerned [here] with an agreement for the sale by Western to Eberline of cable, and the sale of

> capacitors by Eberline to Western. In *Schwinn* the manufacturer *parted with dominion, and the restrictions on sale affected transactions by distributors and retailers.* In our case we have no impediment to competition. Eberline purchased cable from Western, used the cable in making capacitors, and sold the capacitors to Western. *In effect, Western bought cable back, albeit in a different form. Schwinn* has no application. (Emphasis added) *Beltronics II*, 509 F.2d at 1320

Thus, the Tenth Circuit Court implicitly construed the instant situation to be one in which Western Electric did not part with dominion over the cable since it contractually repurchases the cable in a different form. The purchase and sale terms of the Western Electric-Eberline supply contract are so inter-related that "dominion" cannot be said to pass to Eberline. Nor is there any evidence in the instant case of any "firm and resolute" insistence communicated to Eberline with respect to resales to Western Electric only and not the Bell Companies.[2] This is not a situation in which a manufacturer is dealing with its own vertical marketing system and restricting resale to its intermediate wholesalers or franchised retailers downstream into the marketplace. In addition, Petitioner's assertions that the alleged restrictions also prevented unfettered resale of the products to non-Bell telephone companies is in error. The trial court found in an unchallenged finding that here the market for the products in question was "almost entirely, if not entirely" limited to Western Electric and, in turn, Petitioner concedes that the Bell Telephone Companies were the only market. *Beltronics I*, 369 F. Supp. at 298 (App. 5a; Petition p.17).

---

[2]Indeed, one of Beltronics' principals admitted he had never been told that he could not sell direct to the Bell Companies. (RA 424). There is no evidence of any attempt by Eberline to sell directly to a Bell Company.

The Court of Appeals and the trial court found no evidence of any predatory practice or anticompetitive purpose linked to the so-called "resale restriction". Indeed, the District Court found in another undisturbed finding that the purpose of specifications in the Western Electric-Eberline suply contract, such as the provisions requiring use of Western Electric cable, is to control the quality of the finished products sold to Western Electric and supplied to the Bell companies. *Beltronics I*, 369 F. Supp. at 297 (App. 3a). Western Electric's refusal to deal with Beltronics did not occur because of the resale restriction. *Beltronics I*, 369 F. Supp. at 300-301 (App. 12a-13a) The District Court found the sole reasons for termination were Western Electric's unilateral decision that Beltronics violated Western Electric's purchasing policies, and uncertainty as to the respective roles of Beltronics, Eberline and Capco, and confusion as to which should be the contracting party. *Beltronics I*, 369 F. Supp. at 300-301 (App. 13a). These findings were unchallenged in the Court of Appeals but were affirmed specially. *Beltronics II*, 509 F. 2d at 1318-1319 (App. 27a) There are no findings and no evidence was introduced concerning *Schwinn* concepts such as "dominion", "risk of loss", and "title". Petitioner therefore has little or no record upon which to argue its *Schwinn* claim.

III.

WITH RESPECT TO THE ALLEGED *SCHWINN* CLAIM, THERE IS NO BASIS FOR REVIEW OF THE LOWER COURT'S HOLDINGS WITH RESPECT TO EBERLINE.

Petitioner, in recognition of the fact that it was not a party to the supply contract containing the alleged restric-

tion on resale, states in its Petition that Eberline is the party directly injured by the restriction.[3] It has been previously noted that Petitioner also acknowledges that the only market Eberline had for the capacitors was the Bell Telephone Companies. (Petition, p.17). The unchallenged findings of the trial court show that all of Western Electric's actions with respect to Beltronics were unilateral and thus Eberline was not involved, in the anti-trust sense, in any allegedly offending conduct. Further, as the Court of Appeals observes, the resale restriction was negotiated by Beltronics, not Eberline. *Beltronics II*, 509 F. 2d at 1319 (App. 29a).

Thus, leaving aside Beltronics' argument that "injury in fact" exists under *Perkins v. Standard of California*, 395 U.S. 642 (1969) (hereinafter "*Perkins*"), it is nonetheless clear that, in the absence of a finding of conspiracy or collusion between Eberline and Western Electric, as Petitioner urged at trial, any *Schwinn* type restriction operates only against Eberline. Even if the Beltronics-negotiated restriction could rise to the level of a *Schwinn* violation, Eberline would not properly be a defendant against which relief could be sought by Beltronics. For that reason, the trial court's and Court of Appeals' decisions should be deemed final as to Eberline.

---

[3]Petitioner states: "While Eberline is not a plaintiff, it was nevertheless damaged by reason of the resale restrictions because they prevented Eberline from selling the products directly to the Bell Telephone Companies, as well as the non-Bell purchasers." (Emphasis supplied) (Petition, p.17) Of course, there is no evidence of any damage to Eberline by virtue of the alleged restriction. There is no evidence that Eberline lost any profits or sales by virtue of the supply contract's terms.

IV.

THE FACTUAL BASES FOR THE LOWER COURTS' FINDINGS AND CONCLUSIONS THAT NO DAMAGE COULD BE OR WAS CAUSED TO BELTRONICS PRECLUDES ANY CONTENTION THAT THE COURT OF APPEALS' DECISION CONFLICTS WITH *PERKINS V. STANDARD OIL COMPANY OF CALIFORNIA.*

The Court of Appeals has correctly noted that "Beltronics' loss was not caused by the restrictions but by its own conduct which resulted in Western's decision to stop business relations" with Beltronics. *Beltronics II*, 509 F.2d at 1319 (App. 30a).

Petitioner has not challenged below or here the trial court's finding that Western Electric was justified in unilaterally terminating its relationships with Beltronics. *Beltronics I*, 369 F. Supp. at 300-301 (App. 10a-13a) In short, the supply contract restriction did not affect Beltronics. There is no finding or evidence that the restriction had any effect on Eberline's dealings with Beltronics or was a motivation for Western Electric's termination of its relationship with Beltronics.

Additionally, there is no evidence of any desire or effort by Beltronics or Eberline at any material time to deal with companies other than the Bell Companies or to deal with the Bell Companies other than through Western Electric. As Petitioner concedes, the Bell Companies were the only market for Eberline's capacitor products. (Petition, p.17).

Petitioner's strained efforts on page 18 of its Petition to construct a causal connection between the supply contract restriction and Eberline's termination of the exclusive sales

agency agreement is unsupported by any reference to the record, by any evidence or by any finding of the trial court. Incredibly, Petitioner apparently contends at page 18 that the much sought after Western Electric supply contract was an "impairment of Eberline's business". Petitioner's next contention that the resale restrictions "acted directly upon Beltronics by first preventing Beltronics from selling directly to Bell Telephone Companies and later by forcing Eberline to accede to Western Electric's directive to terminate Eberline's relationship with Beltronics" (Petition, p.18) cannot be supported by any reference to the trial court's findings or the record. The only cause of Beltronics' loss was Beltronics' violations of Western Electric's policies and not the wholly unrelated special supply provisions upon which Petitioner now relies.

Petitioner's reliance on *Perkins v. Standard Oil Co.* is ill-founded. *Perkins* clearly recognizes the necessity of showing in civil damage cases a causal connection between the alleged violation and the alleged injury suffered. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969) Consistent with that holding and ancillary to determining the post-tertiary level price discrimination issue, the Court considered Perkins individually to have been "the principal victim . . . since he was directly injured. . .". *Id.*, 395 U.S. at 649. In the instant case there is no injury flowing from the restriction and Beltronics is is no sense a "victim" of it.

Similarly, Petitioner cannot meet the standards of the principal case it cites, *In Re Multidistrict Vehicle Air Pollution MDL No. 31*, 481 F.2d 122 (9th Cir. 1973), *cert. denied*, 414 U.S. 1045 (1973) [hereinafter cited as "*Multidistrict Vehicle Air Pollution*"]. In that case the Ninth Circuit Court noted that standing under Section 4 of the Clayton Act has two distinct ingredients: first, the interests al-

legedly injured must fall within the scope of anti-trust protection and "[a] second and distinct ingredient demands that a plaintiff show that the *defendant's conduct contributed to his injury.*" (Emphasis added). *Id.*, 481 F.2d at 129, n.11. Petitioner Beltronics cannot show any evidence of any contribution to its alleged injury by the supply contract provisions.[4]

Petitioner's evidence thus falls short of satisfying any test of standing or causation. *See, e.g., Riebert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir. 1973), *cert. denied*, 411 U.S. 938 (1973); *Billy Baxter, Inc. v. Coca Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1970).

V.

THE LOWER COURT'S HOLDINGS ARE ALTERNATIVE HOLDINGS, HOLDING NOT ONLY THAT NO *SCHWINN* CLAIM WAS ASSERTED OR ESTABLISHED AND THAT DEFENDANT'S CONDUCT DID NOT CONTRIBUTE TO ANY INJURY OF PETITIONER, BUT ALSO HOLDING THAT THERE WAS NO COMPETENT EVIDENCE TO SHOW THAT PETITIONER WAS DAMAGED IN ANY EVENT.

The trial court excluded Petitioner Beltronics' damage evidence based on a "lost profits" theory for the reason that the court considered it speculative.

Beltronics based its theory of damages, as represented by its offer of proof, (RA 900-918) upon alleged loss of

[4] *In Multidistrict Vehicle Air Pollution*, the Court stated as to one class of dismissed plaintiffs, that they were "not targets of the alleged conspiracy, they were not even on the firing range." *Id.*, 481 F.2d at 129. Here, Eberline did not even fire a shot, according to the trial court's findings.

profits over a 10-year period from 1969 to 1978, on an assumption of the continuation of both Eberline's Western Electric supply contract and Beltronics' Exclusive Sales Representative Agreement with Eberline. Fifteen percent annual increases in sales were projected. On the other hand, Beltronics' alleged profit percentages were based upon 1966 data, the last full year in which Beltronics served as sales agent for Midwec Corporation. The Court considered Beltronics' experience as Midwec's sales agent to be irrelevant and the projection of future profits to be too speculative. Similar evidence has been condemned in other cases. *See, e.g., Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.*, 459 F.2d 138 (6th Cir. 1972); *Continental Baking Co. v. Utah Pie Co.*, 396 F.2d 161 (10 Cir. 1968), *cert. denied*, 393 U.S. 860 (1968). The "offer of proof" (RA 900-918), although arguably trial counsel's theories and not evidence, clearly shows that Petitioner's projections were "arbitrarily taken out of thin air". *Volasco Products Co. v. Lloyd A. Frye Roofing Co.*, 308 F.2d 383, 392 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963). There is also strong authority for the proposition that the proper measure of damage for a company which has gone out of business due to an alleged refusal to deal is its lost profits *prior* to its cessation of business plus a going concern value as of that date, but not including further compensation for lost *future* profits. *See, e.g., Farmington Dowell Products Co. v. Forester Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969); *Albrecht v. Harold Co.*, 452 F.2d 124, 131 (8th Cir. 1971); *Gustafson v. General Motors Acceptance Corporation*, 470 F.2d 1057, 1061 (8th Cir. 1973).

The trial court's refusal to admit such wholly speculative evidence was proper. Although the rule for measuring dam-

age may be liberal once the "fact of injury" has been shown, this does not avoid the requirement that such evidence be probative and meet minimum standards of admissibility. *See, e.g., Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

CONCLUSION

In view of the alternate holdings that there is (1) no *Schwinn* claim, (2) no showing of the fact of injury and (3) no probative evidence of the amount of damage, the Petition should be denied on all or any one of the foregoing grounds.

The decisions below are legally correct, supported by well-established precedent and by substantial evidence. Contentions advanced by Petitioner for grant of the Writ of Certiorari are insubstantial, and founded on erroneous factual premises not found by the trial court. There are no special or important reasons for granting the Petition for the reasons previously stated.

For the foregoing reasons, Respondents respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT C. POOLE
MARSHALL G. MARTIN
816 Bank of New Mexico Building
Albuquerque, New Mexico 87102

Attorneys for Respondents
Eberline Instrument Corporation
and Capco, Inc.

Dated: May 9, 1975

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 13 1975

No. 74-1232

In the Supreme Court of the United States

OCTOBER TERM, 1974

BELTRONICS, INC., *Petitioner*

v.

EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.
and
WESTERN ELECTRIC COMPANY, INCORPORATED
Respondents.

BRIEF OF RESPONDENT WESTERN ELECTRIC COMPANY, INCORPORATED, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STUART S. GUNCKEL
931 - 14th Street
Denver, Colorado 80202
Attorney for Respondent
Western Electric

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
I. Violation of Entertainment and Gift Policies	4
II. Appropriation of a Confidential Document of Western Electric	5
III. Misrepresentation of Beltronics as the Manufacturer	5
IV. The Alleged Boycott and Conspiracy to Boycott	6
REASONS FOR DENYING THE WRIT	7
I. The Questions Presented for Certiorari Were Not Litigated by the Trial Court	7
II. This Court Does Not Review Discretionary Denials of Amendments to the Pleadings	9
III. This Case Does Not Turn Upon the Questions for Which Certiorari is Sought	9
IV. There is No Conflict with Applicable Decisions	10
V. There is No Basis for Reviewing the Trial Court's Findings	13
VI. This Case Does Not Involve Any Question of Great Public Importance	15
CONCLUSION	15

TABLE OF AUTHORITIES CITED

CASES

Appalachian Power Co. v. American Institute of C.P.A., 4 L.Ed.2d 30, 80 S. Ct. 16(1959) 9

Bridge Corp. of America v. The American Contract Bridge League, 428 F.2d 1365 (9th Cir. 1970), *cert. den.*, 401 U.S. 940 12

Chapman v. Barney, 129 U.S. 677 (1889) 9

City and County of Denver v. Denver Union Water Co., 246 U.S. 178 (1918) 10

Kendall Elevator Co., Inc. v. L.B.C. & W. Associates of South Carolina, 350 F. Supp. 75 (S.C. 1972) 12

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 15

McCullough v. Kammerer, 323 U.S. 327 (1945) 7

National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 15

Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969) 14

Polytechnic Data Corp. v. Xerox, 1973-2 Trade Cases, ¶74660 (N.D.Ill., 1973) 12

Rudolph v. United States, 370 U.S. 269 (1962)..... 15

Sawyer v. Piper, 189 U.S. 154 (1903) 9

Smith v. Butler, 366 U.S. 161 (1961) 10

Standard-Vacuum Oil Co. v. United States, 339 U.S. 157 (1950) 7

Town of Santa Ana v. Frank,
113 U.S. 339 (1885) 10

Tripoli Co. v. Wella, 425 F.2d 932 (3rd Cir. 1970),
cert. den. 400 U.S. 831 12

United States v. Arnold, Schwinn & Co.,
388 U.S. 365 (1967) 8, 10, 11, 12, 13

United States v. National Association of Real Estate
Boards, 339 U.S. 485 (1950) 14

United States v. Yellow Cab Co., 338 U.S. 338 (1949) 14

Weather Wise Co. v. Aeroquip Corp.,
368 F.2d 716 (1972) 11

STATUTE

15 U.S.C. §§1 & 2 (Sherman Act) 2, 7, 8, 12, 13

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1232

BELTRONICS, INC., *Petitioner*,

v.

EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.
and
WESTERN ELECTRIC COMPANY, INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT WESTERN ELECTRIC IN OPPOSITION

Respondent Western Electric Company, Incorporated, referred to herein as Western Electric, opposes the Petition for a writ of certiorari.

Petitioner is referred to as Beltronics. Respondents Eberline Instrument Corporation and Capco, Inc., are referred to as Eberline and Capco, respectively.

QUESTIONS PRESENTED FOR REVIEW

The questions for which Petitioner seeks a writ of certiorari are not properly before the Court. The questions presented are ones upon which the trial court did not receive evidence, did not make findings of fact and did not render conclusions of law. Hence, Petitioner's questions are not appropriate for certiorari.

Furthermore, Petitioner's questions misrepresent the operative facts and legal issues. This action arose, as it concerns anti-trust issues, because Western Electric refused to do any further business with Petitioner after learning that the Petitioner had bribed Western Electric employees with favors, had improperly obtained and used Western Electric internal and confidential price lists and had deliberately deceived Western Electric as to the Plaintiff's true business function and operations. Because of Western Electric's decision, Petitioner charged Western Electric and the other Respondents with a boycott and conspiracy to boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The questions presented for certiorari do not frame those facts or issues.

Finally, Petitioner's questions are argumentative and inaccurate. Question Nos. 1 and 2 are designed to give the impression that this case involves the distribution and sale by Western Electric of cable and wire for purposes of resale. The fact is that this case involves the purchase by Western Electric of capacitors and capacitor cases manufactured by Eberline and Capco. Cable and wire were only one of many component parts of those products. Western Electric merely furnished the wire and cable which were to be incorporated and fabricated into the products in order that the products could achieve the necessary performance requirements. Thus, Western Electric is purchasing, not distributing, products. Petitioner's questions do not fairly and objectively set forth that circumstance.

STATEMENT OF THE CASE

On August 1, 1968, Western Electric contracted with Eberline to purchase capacitors and capacitor cases, which were products manufactured by Eberline's subsidiary. At that time, Beltronics was a wholly-owned subsidiary and marketing arm of Eberline and had negotiated the Western Electric contract for Eberline.

In January 1969, Eberline divested its ownership of Beltronics by selling its stock to the officers of Beltronics. Beltronics then entered into its exclusive sales representative agreement with Eberline to receive from Eberline commissions on the sale to Western Electric of capacitors and capacitor cases manufactured by Capco, Eberline's subsidiary. Beltronics did not inform Western Electric of this change in its status or of its new contractual relationship to Eberline.

In mid-March 1969, Western Electric, believing that Beltronics was still a subsidiary of Eberline, decided not to renew its contract with Eberline for the purchase of capacitors and capacitor cases. The contract was due to expire by its terms on April 30, 1969.

Western Electric arrived at its decision for three reasons, all of which were based upon the misconduct of the officers and now present owners of Beltronics. First, Beltronics had excessively entertained Western Electric's purchasing agents at dinner in violation of Western Electric's gift and entertainment policies, in return for which a Western Electric buyer had furnished to Beltronics confidential price information about capacitors and capacitor products manufactured by others. Second, Beltronics had improperly appropriated and used, without permission, the "Index of Purchase Contracts", an internal, confidential document of Western Electric. Third, Beltronics had misrepresented itself as the manufacturer of capacitors and capacitor cases when the purchase contract had been entered into the previous August, 1968.

I.
Violation of Entertainment and Gift Policies

Beltronics knew of Western Electric's policy prohibiting dinner and entertainment of Western Electric's employees. It is Western Electric's policy that its purchasing agents are not to be taken to dinner by suppliers and sellers, except under very unusual and extenuating circumstances. It is also Western Electric's policy that gifts are not to be given to its purchasing agents and that it is deemed a gift for a supplier to buy dinner for a Western Electric employee when the supplier is not present.

The reason for Western Electric's policy is that:

> "Western Electric feels that the only way they can award any business is on merit. We are concerned with the health of our suppliers. We are concerned about competition, and we feel that the only way we can be objective is to award the business on the basis of merit, and if by any chance the objective judgment of the buyer were influenced in any way direct or indirect or in any manner by gifts or entertainment, we feel this would undermine our policy of awarding business on the basis of merit, and we think it is unnecessary and a very questionable practice, which only raises questions both of the donor and the recipient, and therefore is not an accepted practice or policy with the company." (889-890)

Between March 7, 1967 and February 13, 1969, Beltronics entertained Western Electric purchasing agents at lunch and dinner on 22 occasions. Mr. Frank Artale, a clerk in Western Electric's Purchasing Department who had typing responsibilities for all contracts with all suppliers of capacitors and capacitor cases, was entertained by Beltronics on all 22 of these occasions. Twelve of those entertainment occasions involved dinner. On two occasions, in 1967 and again in 1969, Beltronics arranged for dinner for Artale and his family at the Tower Suite, an exclusive New York restaurant, at

which Beltronics representatives were not present. In return for that hospitality and favoritism, and at Beltronics' suggestion, Artale supplied Beltronics with information about the prices for capacitors and capacitor cases purchased by Western Electric from other manufacturers. (663-67; Exh. ZZZ, 1077, at 1079)

II.
Appropriation of a Confidential Document of Western Electric

Each month Western Electric publishes an "Index of Purchase Contracts," which is a summary listing of Western Electric's purchase contracts. It is used by Western Electric's purchasing agents to order supplies, equipment and materials. It is a private, internal document and is considered by Western Electric to be confidential. In October 1968, Beltronics took a copy of Western Electric's Index of Purchase Contracts from a wastebasket in the office of one of Western Electric's buyers. Beltronics did not ask for and was not given permission to take the Index. The Western Electric buyer was in the office at the time. Of the 22 occasions on which Beltronics had entertained Western Electric buyers at either lunch or dinner, that particular buyer had been entertained on 17 of those occasions, including 7 of the 12 dinner occasions.

III.
Misrepresentation of Beltronics as the Manufacturer

Western Electric believed that it was important to determine the identity of the manufacturer of the products it purchased in order to avoid problems of over dependency on the part of both Western Electric and the manufacturer. Western Electric also desired to be assured of the financial responsibility and capability of the proposed manufacturer to stand behind and service the products.

In the early summer of 1968, when Beltronics was negotiating with Western Electric for the manufacture and sale

to Western Electric of the products, Western Electric received a Dun & Bradstreet report which identified Beltronics as a manufacturer's representative rather than a manufacturer. Western Electric asked Beltronics for a clarification, and Beltronics stated that the Dun & Bradstreet report was wrong and that it would be corrected. Thereafter, in July 1968, Western Electric received a new Dun & Bradstreet report which now listed Beltronics as a manufacturer. Beltronics then helped draw a schematic diagram of the corporate relationships of Beltronics and Eberline which showed that Beltronics was a manufacturer with a plant in Lubbock, Texas. Because of those representations, the Western Electric contract with Eberline in August 1968 stated that Beltronics was a manufacturing subsidiary of Eberline and would manufacture the capacitors and capacitor cases. In truth and fact, that was a deliberate misrepresentation by Beltronics, for Beltronics was nothing more than a manufacturer's sales representative.

In early 1969, Western Electric learned that Beltronics was not the manufacturer.

IV.
The Alleged Boycott and Conspiracy to Boycott

When Western Electric decided in mid-March 1969 not to renew its contract with Eberline, Western Electric communicated that decision to Beltronics. Beltronics communicated that decision to Eberline. Beltronics requested a meeting with Western Electric on April 14, 1969. Eberline also attended that meeting, but its attendance was at the suggestion of Beltronics. There were absolutely no communications or contacts between Western Electric and Eberline or Capco either prior to Western Electric's decision in mid-March or prior to the meeting of April 14, 1969. Western Electric's decision not to do business with Beltronics was unilateral.

At the meeting on April 14, 1969, Western Electric learned for the first time that Beltronics was no longer a subsidiary of Eberline and that the relationship between

Eberline and Capco and Beltronics had, since January 2, 1969, been solely contractual in nature. Eberline stated that it had not known of Beltronics' misdeeds and that it did not condone them. Eberline and Capco then represented that they had already terminated their contractual relationship with Beltronics. Beltronics did not disavow Eberline's statements or representations that the relationships between Eberline, Capco and Beltronics had already been severed.

REASONS FOR DENYING THE WRIT

I.
The Questions Presented for Certiorari Were Not Litigated by the Trial Court

This Court has stated that it will not review on certiorari questions which were not litigated in the lower courts. *Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157 (1950); *McCullough v. Kammerer*, 323 U.S. 327 (1945). That is the posture of this case. The questions presented in the Petition for Writ of Certiorari were not among the issues that were tried in the District Court; no evidence was received upon the issues; no findings or conclusions were made upon the questions presented.

The Petitioner commenced this action in the District Court in and for the City and County of Denver, State of Colorado, on June 23, 1969, just two months after Western Electric's decision. Petitioner brought suit against only Eberline and Capco for breach of the exclusive sales representative agreement. Western Electric was not a party to the suit. Eberline and Capco removed the action to the U.S. District Court. Discovery was pursued and pretrial conferences held, and then, almost a year after the suit was started, the Petitioner was given leave to amend its complaint and to join Western Electric as a party. In the amended complaint, Petitioner asserted claims against Western Electric for monopolization in violation of Section 2 of the Sherman Act, and against Western Electric, Eberline and Capco for boycott and conspiracy to boycott in violation of Section 1 of the

Sherman Act, 15 U.S.C. §§1 and 2. Petitioner did not assert in the amended complaint any allegation that the Respondents had committed any anti-trust violation under the doctrine of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

Six months later, Beltronics was given the opportunity to amend its complaint yet a second time, which it did. However, the claims did not change.

Discovery thereafter ensued on the part of all parties, in the course of which the Petitioner answered interrogatories defining the basis and nature of its claims. Those answers excluded any contention that the Respondents had committed any anti-trust violations under the doctrine of the *Schwinn* case. Pretrial procedures were again initiated and many conferences held. Near the conclusion thereof, Petitioner moved to amend its complaint yet a third time to assert a claim under the *Schwinn* case. At the same time, the Petitioner supplemented its earlier answers to interrogatories by enlarging the description of the basis and nature of its contentions to include for the first time a claim under the *Schwinn* case. The supplemental answers to interrogatories and the third amendment to the complaint were filed almost three years after the suit had been commenced and at a time when it was contemplated that trial was imminent. The third amendment was denied by the trial court on the grounds that it was too late, that it was not based on any newly discovered evidence, and that it had not been a part of the previous amendments liberally allowed.

During the course of the trial, the trial court refused all claim, argument and evidence that Western Electric had violated Section 1 of the Sherman Act in the manner proscribed by the *Schwinn* case. The trial court made no findings or conclusions with respect to that belated contention.

Thus, the Petition for Certiorari should be denied because the questions presented by the Petition were not a part of the claims set forth in the pleadings and litigated in

trial court and were not questions upon which the District Court made findings of fact and entered conclusions of law.

II.
This Court Does Not Review Discretionary Denials of Amendments to the Pleadings

The questions set forth in the Petition for Writ of Certiorari were the subject of the Petitioner's belated, third attempt to amend its complaint. Thus, before the substance of the questions raised by the Petitioner can be considered, the trial court's order denying the motion to amend must first be dealt with. That ruling, of course, involves the application of the Federal Rules of Civil Procedure and is a matter of discretion. This Court has stated that it does not review orders respecting amendments to pleadings since such rulings are discretionary. *Chapman v. Barney*, 129 U.S. 677 (1889); *Sawyer v. Piper*, 189 U.S. 154 (1903). Furthermore, it has been noted by a justice of this Court that ordinarily the trial court's application of the Federal Rules of Civil Procedure will not be accorded review. *Appalachian Power Co. v. American Institute of C.P.A.*, 4 L.Ed.2d 30, 80 S. Ct. 16 (1959).

Therefore, the Petition for Writ of Certiorari should be denied for the reason that Petitioner must first obtain a review and reversal of the order denying the motion to amend. Petitioner has not framed any question respecting the trial court's denial of the motion to amend, and this Court will not review orders relating to amendments or to the application of the Federal Rules of Civil Procedure.

III.
This Case Does Not Turn Upon the Questions for Which Certiorari is Sought

A review and reversal upon the questions presented for certiorari would not alter the result in this case. The trial court's discretionary ruling denying the amendment still stands. It has not been reversed by the Tenth Circuit United States Court of Appeals. Therefore, a review and reversal by

this Court of the Circuit Court's opinion would not entitle Petitioner to any relief since the trial court's denial of the amendment is not in issue. Furthermore, no issue has been framed with respect to the trial court's findings, conclusions and judgment regarding the boycott and conspiracy claims that were litigated.

The Petitioner contended in its appeal to the Circuit Court that the court had abused its discretion in denying the third amendment to the complaint and that the Petitioner was entitled to judgment in the Circuit Court upon the claim stated in the amendment, even though evidence had not been received by the trial court on that claim. The Respondents defended the appeal on the basis that the trial court had not abused its discretion in denying the third amendment and that the amendment did not, in any event, state a cause of action under *United States v. Arnold, Schwinn & Co., supra.* While the Circuit Court felt moved to discuss the failure of the third amendment to set forth a cause of action, the Circuit Court did nothing to disturb the order denying the amendment. To the contrary, the Circuit Court's conclusion of affirmance sustains the order denying the amendment and, therefore, denies the Petitioner any right to relief.

A review by certiorari of the questions presented would be an academic exercise. The result in this case does not and will not turn upon those questions. The verdict and result were sustained on grounds which are not presented by the Petition, and, therefore, it is futile and unnecessary to consider the questions presented for certiorari. Accordingly, the Petition for Certiorari should be dismissed. *Smith v. Butler,* 366 U.S. 161 (1961); *Town of Santa Ana v. Frank,* 113 U.S. 339 (1885); *City and County of Denver v. Denver Union Water Co.,* 246 U.S. 178 (1918).

IV.
There is No Conflict With Applicable Decisions

Petitioner contends that the decision herein of the Circuit Court conflicts with the decision in *United States v.*

Arnold, Schwinn & Co., 388 U.S. 365 (1967). The Petitioner is in error, for the *Schwinn* case involved the sale of bicycles for purposes of resale, whereas the instant case involves the purchase by Western Electric of products for which Western Electric furnished only enough cable and wire to be used as a component part of the capacitor cases. Western Electric did not furnish cable and wire for resale as was done in *Schwinn*.

In the *Schwinn* case, the manufacturer marketed the bicycles by selling them to distributors with restrictions upon the resale by the distributor to the retailers. On the other hand, Western Electric did not sell cable and wire to Eberline for purposes of resale. Eberline was manufacturing capacitors and capacitor cases for purchase by Western Electric, and Western Electric provided cable and wire only for the purpose of manufacturing the particular product and for use only as one of the many components thereof. To that end, Western Electric did not supply unlimited quantities of cable, but only so much as was necessary for the manufacture and fabrication of the products. The provision providing for the use of the cable and wire solely in the capacitor cases appears as a part of the contract between Western Electric and Eberline by which Western Electric purchased the completed capacitors and capacitor cases. There was no separate or general arrangement or agreement whereby Western Electric sold cable and wire to Eberline for any purpose or circumstance. The entire arrangement was limited to the purpose of Western Electric purchasing from Eberline a product to be manufactured by Eberline in accordance with certain performance standards and specifications.

Thus, the decision herein of the Circuit Court is not in conflict with *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Rather, the situation here is analogous to that in *Weather Wise Co. v. Aeroquip Corp.*, 368 F.2d 716 (1972). In that case, Aeroquip manufactured and sold couplings for air conditioning units only to companies that manufactured complete air conditioning systems. The plaintiff was a manufacturer of tubing for air conditioning systems, and because it could not get the couplings from the plaintiff,

it brought an action under Section 1 of the Sherman Act. The Second Circuit rejected the application of the *Schwinn* case, stating:

> "This argument also is not persuasive because Aeroquip's actions did not constitute resale restrictions, but were merely an attempt by Aeroquip to follow its own sales policy of not knowingly selling couplings for resale."

Certiorari was denied, 410 U.S. 990. Western Electric did no more than Aeroquip.

The capacitors and capacitor cases involved in this case are a higher grade product than are otherwise available for industrial use. That is because the telephone products have to withstand higher flash voltages. The original specifications and samples of the subject products were, as admitted by Beltronics officers, improved by Bell Telephone Laboratories. Products submitted by Beltronics for testing in 1968 had in fact failed the quality control test and changes and improvements had to be made in the product. Western Electric's concern for quality control, product integrity, and technical competency are, of course, a legitimate business purpose. *Tripoli Co. v. Wella*, 425 F.2d 932 (3rd Cir. 1970), *cert. den.* 400 U.S. 831; *Kendall Elevator Co., Inc. v. L.B.C. & W. Associates of South Carolina*, 350 F. Supp. 75 (S.C. 1972); *Polytechnic Data Corp. v. Xerox*, 1973-2 Trade Cases, ¶74660 (N.D.Ill. 1973); *Bridge Corp. of America v. The American Contract Bridge League*, 428 F.2d 1365 (9th Cir. 1970), *cert. den.*, 401 U.S. 940.

The specifications provided for the use of Western Electric cable and wire, but there was express allowance for the use of equivalents. There was no evidence that Western Electric denied the use of equivalent cable or wire. The trial court expressly concluded that the purpose of the specifications was not anti-competitive, but was "... to control the quality of the products." That finding is supported by the evidence.

It should be noted that, during the course of the appeal to the Tenth Circuit Court of Appeals, the Petitioner withdrew all contentions against Western Electric of monopolization in violation of Section 2 of the Sherman Act.

Thus, this case is not analogous to and is not in conflict with the *Schwinn* case. The decision of the Court of Appeals herein is, on the contrary, consistent with the decisions in *Schwinn* and the other cases cited above.

V.
There is No Basis for Reviewing the Trial Court's Findings

After having heard voluminous evidence and having had the opportunity to judge the credibility of the witnesses, the trial court made extensive findings, and this case was decided upon that basis. The Court of Appeals concurred in those findings and conclusions.

In question No. 2 and the argument in support thereof, Petitioner takes issue with the statement in the opinion of the Court of Appeals that "in any event we find nothing in the record to show that Beltronics was, or could have been, damaged by the restrictions." That statement is an appellate affirmance that the record substantiates and supports the trial court's findings and conclusion that the Petitioner's alleged injury and damages were not proximately caused by any violation of the Sherman Act. The trial court concluded that Petitioner's injury was proximately caused by Western Electric's refusal to deal with Beltronics because of Beltronics' deceit and deception, because of Beltronics' appropriation of Western Electric's documents without permission, and because of Beltronics' seduction of Western Electric employees contrary to known policies in order to gain favored treatment and information. Specifically, the trial court said:

> "Assuming arguendo that the acts of the parties or any of them were in violation of either Sections 1 or 2 of the Sherman Act, the injury and damage suffered by the plaintiffs were not proximately

caused by any unlawful restraint or monopolization of trade in violation of Sections 1 and 2 of the Sherman Act, but were proximately caused by Western Electric's exercise of its legal right to refuse to deal with Beltronics or with Eberline and Capco so long as they were associated with Beltronics."

Petitioner apparently accepts the trial court's findings for the Petitioner has attempted to structure legal questions for certiorari which it bases on those findings, even though no evidence was received on the questions which Petitioner has framed. Nevertheless, since Petitioner, apparently accepts the trial court's findings, it is also bound by the findings regarding proximate cause, which findings have support in the evidence. This Court has refused certiorari review of trial court findings under similar circumstances. *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949).

It is not enough that the U.S. Supreme Court might give the facts another construction than that accorded by the trier of fact. When the trier of fact's findings are supported by the evidence, as is so obviously and amply the situation in the case at bar, then review of those findings by certiorari is not warranted. *United States v. National Association of Real Estate Boards,* 339 U.S. 485 (1950).

Petitioner discusses at length the decision of *Perkins v. Standard Oil Company of California,* 395 U.S. 642 (1969), and argues, in essence, that the conclusions herein are in conflict with the decision in that case. However, there is no conflict, for in *Perkins v. Standard Oil Company of California, supra,* this Court deferred to the trier of fact upon the issue of proximate cause. In the case at bar, this Court should similarly decline to interfere with the findings of proximate cause made by the trier of fact.

Since the trier of fact has, with justification and reason, found that any violation of the Sherman Act is not the proximate cause of Petitioner's claimed injury it is futile and unnecessary to consider the other questions presented for certiorari.

VI.
This Case Does Not Involve Any Question of Great Public Importance

As reflected in the statement of the case, this case turns on its own particular set of facts, namely, Beltronics' premeditated and repeated violation of Western Electric's known policies prohibiting dinners and gifts and entertainment, Beltronics' appropriation of Western Electric documents without permission, and Beltronics' misrepresentation. These are matters of interest solely to the parties. The case does not involve any question of great public importance, and, accordingly, certiorari should be denied. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923); *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951); *Rudolph v. United States*, 370 U.S. 269 (1962).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Stuart S. Gunckel
Room 1300, 931 - 14th Street
Denver, Colorado 80202

Attorney for Respondent
Western Electric Company,
Incorporated

SUPREME COURT, U. S.

FILED

MAY 30 1975

MICHAEL RODAK, JR., CLERK

No. 74-1232

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

BELTRONICS, INC., Petitioner,

v.

EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.
and
WESTERN ELECTRIC COMPANY, INCORPORATED,
Respondents.

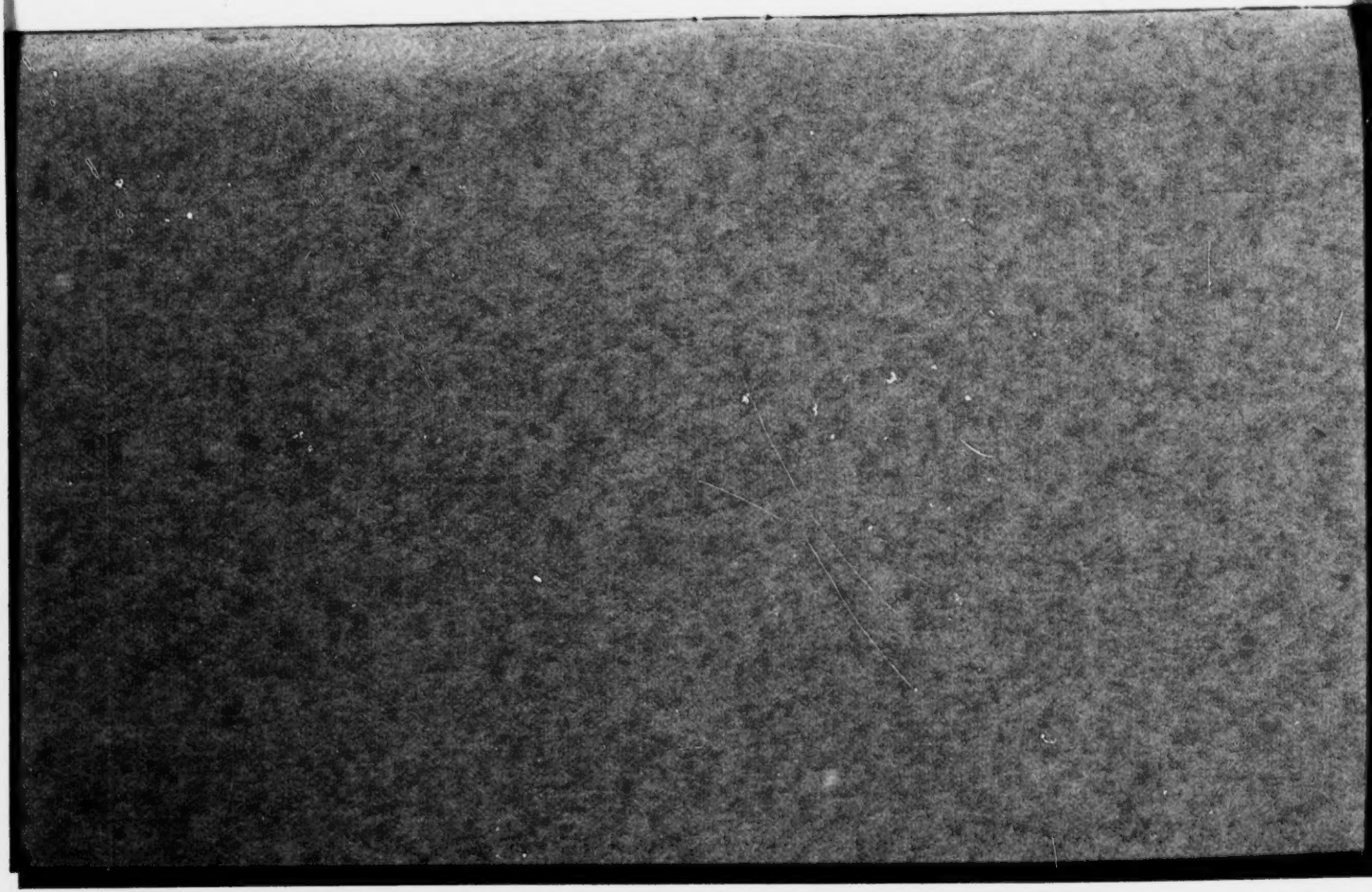
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN T. WILLSON
900 Equitable Building
Denver, Colorado 80202
Attorney for Petitioner

Of Counsel:

DWIGHT A. HAMILTON
FULLER AND EVANS
900 Equitable Building
Denver, Colorado 80202



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1232

BELTRONICS, INC., Petitioner,

v.

EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.
and
WESTERN ELECTRIC COMPANY, INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Beltronics, Inc. submits this Reply Brief in reply to arguments first raised in the briefs in opposition.

I

THE SCHWINN ISSUE IS PROPERLY BEFORE THE COURT

Respondents' arguments that the Schwinn issue is not properly before the Court ignore the controlling fact that the Court of Appeals actually decided that issue.

It was Petitioner's position before the District Court that its antitrust claim properly alleged violation of Section 1 of the Sherman Act because of, inter alia, the contractual restriction on resale of cable and wire sold by Western Electric to Eberline. Nevertheless, because this was questioned by counsel for Respondents more than one year prior to trial, Petitioner, out of an abundance of caution, moved to amend its antitrust claim to set forth even more specifically allegations concerning the resale restriction. The motion to amend was denied because the case was then over three years old, was therefore considered by the Judicial Conference to be an emergency case, and the District Court consequently would not allow any amendment which introduced new theories into the case. Implicit in that ruling was the decision that the Schwinn issue was not already contained in the antitrust claim.

Petitioner appealed the denial of the motion to amend to the Court of Appeals on the grounds that, first, the

District Court erred in ruling that the Schwinn issue was not already included in the antitrust claim, and, second, the District Court's denial of the motion to amend was an abuse of discretion.

The Court of Appeals did not specifically mention this aspect of Petitioner's appeal in its opinion, but its actual decision of the Schwinn issue belies any argument that it did not implicitly overrule the District Court on the existence of that issue in the case. (App. 31a)[1] Whether the Court of Appeals thought the issue was already in Petitioner's antitrust claim, or thought the motion to amend should have been granted, is not material. The fact that the issue was decided is controlling. Had the Court of Appeals desired to affirm the District Court's refusal to accept the Schwinn issue it would simply have done so, and had it done so decision of the issue itself would not have been necessary.

Respondents argue that the issue was not litigated, and that no findings of fact or conclusions of law were entered on the issue. Nevertheless, the essentially undisputed evidence which was admitted on other issues combined with the Findings of Fact which were made was sufficiently broad to allow the Court of Appeals to decide that the

---

1 The reference "App. __" is to the Appendix to Petitioner's Petition For a Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit.

Schwinn doctrine did not apply to this case.

This case is therefore in the posture that the Court could reverse the Court of Appeals and hold that there exists a violation of the Schwinn doctrine, and remand the case for a trial on damages. Or, in the alternative, the Court could reverse the Court of Appeals' distinguishing of this case from Schwinn on the basic facts, and remand for a further trial on the question of violation. The latter alternative would permit a trial on the issue with the guidance of this Court. Petitioner would then pursue discovery in this area which was disallowed by the District Court, and re-offer the evidence which was excluded at trial. Petitioner would thus be able to establish an even stronger factual basis for violation of the Schwinn doctrine, if this is deemed necessary.

II

THE VIOLATION OF THE SCHWINN DOCTRINE WAS THE PROXIMATE CAUSE OF PETITIONER'S DAMAGE

The District Court found that prior to 1962 Beltronics, as a sales representative, sold the predecessors of the subject products to the Bell Telephone Companies. (App. 3a-4a) Following issuance of the Bell Laboratories' specifications and the Western Electric Supply Contract in 1962, Beltronics sold

the subject products, as a sales representative, not to the Bell Telephone Companies but instead to Western Electric as was required by the plain terms of the supply contract. (RA 1051-1069; 969-976; 1036-1042)[2]

Respondents' reference to the activities of Beltronics which the District Court found gave Western Electric grounds to believe its entertainment and gift policy had been violated, and other activities of Beltronics, do not change the central fact that, but for the contractual restriction on resale of the cable and wire, Western Electric's decision not to do further business with Beltronics would not have prevented Beltronics from fulfilling its commitment to Eberline by selling the subject products directly to the Bell Telephone Companies and to the non-Bell telephone companies in the telephone industry. Accordingly, the recited activities of Beltronics are irrelevant to the issue of proximate cause in the antitrust claim.

CONCLUSION

Respondents have attempted to inject procedural issues into this case which simply do not exist. The Schwinn issue was unquestionably decided by the Court of Appeals and it is axiomatic that courts of appeal do not decide

---

2 The reference "RA __" is to the Appendix filed with the Court of Appeals, a copy of which has been lodged with the Clerk of the Court.

issues which do not require decision. Therefore, the inevitable conclusion is that the Court of Appeals decided that the Schwinn issue was properly pleaded, or the motion to amend the antitrust claim should have been granted. The Schwinn issue was thus preserved for review by this Court.

Respondents have attempted to divert attention from the basic antitrust issue by references to entertainment and other activities of Beltronics. These actions, however, are irrelevant to the fundamental violation of Section 1 of the Sherman Act being presented to the Court.

The arguments first raised in the briefs in opposition should be rejected, and for the reasons stated in the Petition the Writ should be granted.

Respectfully submitted,

JOHN T. WILLSON
900 Equitable Building
Denver, Colorado 80202
Attorney for Petitioner

Of Counsel:
DWIGHT A. HAMILTON
FULLER and EVANS
900 Equitable Building
Denver, Colorado 80202

Dated: May 22, 1975